No. 90-1498

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In The

Supreme Court of the United States

October Term, 1990

INDIAN CHILD WELFARE COORDINATOR OF THE JUVENILE COURT OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL.

Petitioners,

v.

CHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a state appellate court, with no more than a cold record before it, violates the due process clause of the Fourteenth Amendment of the Constitution of the United States and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.* by striking a trial court's findings of fact based on the weight and credibility of witnesses and substituting its own findings concerning the existence of "good cause" to deny transfer of an Indian child custody case to tribal court.

2) Whether a state appellate court may defeat the Congressional preference for tribal court jurisdiction by using the Indian placement preference of the Act to establish a judicial presumption in favor of state court jurisdiction solely for the benefit of non-Indian foster parents in Indian child custody cases.

3) Whether a state appellate court may ignore this Court's explication of the Congressional mandate of the Indian Child Welfare Act of 1978 in *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597 (1989) by failing to even consider the obligation to protect the federal rights of the children as Indians, the rights of the Indian parent and the rights of the children's tribe in determining whether there is "good cause" to deny tribal court jurisdiction in an Indian child custody case.

4) Whether by mere speculation as to the witnesses that state social services and the non-Indian foster parents would call in an Indian child custody case, a state

QUESTIONS PRESENTED – Continued

appellate court may avoid this Court's holding in *Mississippi Band of Choctaws v. Holyfield, supra,* that tribal jurisdiction created by the Indian Child Welfare Act of 1978 is determined by federal law standards.

LIST OF PARTIES

The Parties to the Proceedings Below Were:

Petitioner Indian Child Welfare Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe for the Cheyenne River Sioux Tribe, and the natural parents, Joe L. Coleman and Phyllis Coleman, in their own behalf. Mr. and Mrs. Coleman support, but have not officially joined, this petition for writ of certiorari because they are not presently represented by counsel.

Respondents Chester County Department of Social Services and Richard Steele, Guardian Ad Litem, for the Indian children BJM, TM, HC and JC. It is noteworthy that the non-Indian foster parents were never actual parties to this action.

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OPINIONS BELOW

The December 10, 1990 opinion of the South Carolina Supreme Court denying transfer of the case to the tribal court is printed in the Appendix (App.) at App. 1. The April 5, 1989 opinion of the South Carolina Family Court granting transfer of the case to the tribal court is printed at App. 9. The September 26, 1988 opinion of the South Carolina Court of Appeals remanding the family court's earlier transfer order is printed at App. 25, and is

reported at 296 S.C. 355, 372 S.E.2d 912 (Ct. App. 1988). The November 10, 1986 opinion of the family court ordering transfer is printed at App. 31. The April 4, 1986 opinion of the state supreme court remanding the family court's first transfer order is printed at App. 36. The February 28, 1986 opinion of the family court transferring the case to South Dakota for placement of the children in accord with the Indian Child Welfare Act is printed at App. 38.

JURISDICTION

The judgment of the state supreme court denying the presumptive tribal court jurisdiction created by the Indian Child Welfare Act, 25 U.S.C. § 1911(b), was entered December 10, 1990, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *See, also, Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Construction Laborers v. Durry*, 371 U.S. 342, 346 (1963).

STATEMENT OF THE CASE

This action involves the persistent refusal of the South Carolina appellate courts to recognize the Congressional mandate of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (the "ICWA" or the "Act") and this Court's decision in *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597 (1989). The South Carolina Family Court has tried three times to transfer this case to South Dakota to allow the Cheyenne River Sioux Tribe to determine the future of its own children,

and the South Carolina appellate courts have repeatedly intervened to preserve the placement of the Sioux Indian children with non-Indian foster parents.

Over seven years ago, the Chester County, South Carolina Department of Social Services ("social services") removed four Indian children from their home and "temporarily" placed them in separate non-Indian foster homes. The four children, BJM, TM, JC and HC, and their mother,[1] are members of the Cheyenne River Sioux Tribe of South Dakota. In May, 1984, after efforts to reunite the family began, the foster parents brought to light allegations of sexual abuse. In response, social services petitioned for termination of parental rights. In June, 1984, shortly after the Tribe was notified of the intent to terminate the Indian family's relations, *see* 25 U.S.C. § 1912, the Tribe requested transfer of the case to the Juvenile Court of the Cheyenne River Sioux Tribe (the "tribal court"), and the tribal court attempted to place all of the children

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[1] The children's mother, Phyllis Bald Eagle Coleman, is a full-blood Cheyenne River Sioux tribal member. BJM and TM are also full-blood Cheyenne River Sioux tribal members, by Ms. Coleman's first husband. JC and HC are Ms. Coleman's children by her second husband, Mr. Joe Coleman. He is black, and much was made of this at the transfer hearings. *E.g.*, October, 1986 Transcript ("10/86 Tr.") at 42, witness Mandell (JC has no "evidence of being identified with an Indian background, [but has] elements in speech that are like Blacks' speech"). That is, of course, irrelevant because JC and HC are tribal members. 25 U.S.C. § 1903(4).

Since November, 1983, BJM and TM have been placed with the same white foster parents. JC and HC have been placed four times, but they have been with the same black foster parents since 1985.

with their grandparents on the Cheyenne River Indian Reservation.

While a criminal investigation was pending, the family court declined to transfer the case to the tribal court. Although the extended Indian family was willing to care for the children and tribal foster care institutions were available, *see* 25 U.S.C. § 1915(b), the children were left with non-Indian foster parents. In April, 1985, the trial of the parents for child abuse ended in a mistrial when 11 of the 12 jurors voted for acquittal. The State dropped the criminal action.

The allegations of sexual abuse were considered in family court in February, 1986, and again, the Tribe requested transfer of the case to tribal court. The family court ordered the transfer of the children to the State of South Dakota Department of Social Services for placement "according to the policies established by the Indian Child Welfare Act of 1978." App. 44. The state supreme court remanded the case for reconsideration on April 14, 1986. After another hearing, the family court ordered the transfer of the case to the tribal court on November 10, 1986. App. 31.

The foster parents appealed and moved for a stay pending appeal, and the guardian ad litem[2] joined the

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[2] Since the beginning of this action, there has been a disturbing alliance between the foster parents and the guardian ad litem. At the October, 1986 hearing on the Tribe's transfer petition, the court held that the foster parents had no standing in the matter. The guardian's attorney offered to permit the foster parents' attorney to represent the guardian,

(Continued on following page)

foster parents' motion and appeal. The state court of appeals reversed, claiming that on the record before it, the court could not determine whether "good cause" existed to deny the transfer. The court of appeals directed the family court to reconsider the issue, and to address, *inter alia*, whether the "removal of the children" from the foster parents would be detrimental to their interests. App. 30.

On January 19 and 20, 1989, the family court held another hearing to reconsider the transfer issue, and in its written opinion of April 5, 1989, found, *inter alia*:

> 1) The natural *parents "reside on the* Cheyenne River Sioux *Reservation."* Family Court Finding ("F. Ct.") 21. "[P]arental rights have not been terminated and *the children could be reunited with their birth mother* and father or step-father as the case may be," F. Ct. 34, or "with an Indian family as opposed to the present situation where two of the children are placed with Black foster parents and two . . . with White foster parents."

(Continued from previous page)

but the family court rejected the offer based on the conflict of interest between the foster parents and the guardian. 10/86, Tr. 10-12.

Later, the guardian withdrew. When a new guardian was appointed, the state supreme court, over objection, appointed the foster parents' attorney as attorney for the guardian. The simultaneous representation is troubling because the non-Indian foster parents seek permanent custody of the children while the guardian has the responsibility to act solely for the interests of the children, including their interests as Indian children. *See, generally,* Code of Professional Responsibility, DR 5-105; *see, e.g., Dunton v. County of Suffolk,* 729 F.2d 903 (2d Cir. 1984). (Police officer denied fair trial where attorney simultaneously represented both the officer and the defendant county in 42 U.S.C. § 1983 action).

Family Court Summary ("F. Ct. Summ.") (Emphasis added.)

2) "All of the blood kin, with the exception of the paternal grandparents in North Carolina, are living in South Dakota. The Indian heritage, to which these children are entitled, is on the Sioux Indian Nation in the State of South Dakota. . . . *[N]othing remains in South Carolina except the children themselves.*" F. Ct. Summ. (Emphasis added.)

3) Although removal of the children from their foster placements would be "disruptive and adversely affect the children in the short term, [t]here is no basis to conclude . . . that removal and placement with the tribal community will be detrimental to the children in the long term." F. Ct. 40.

4) *"[T]he Tribe ha[s] resources available* . . . to provide the children with suitable counseling and therapy. . . . Social Services has not provided the children with any counseling or therapy to date." F. Ct. 36. (Emphasis added.)

5) *"The Tribal Court is well equipped* to deal with the difficult questions which surround the placement of these children." F. Ct. 37. In contrast, Social Services was unable to locate anyone who had knowledge of the "social and cultural standards of the Indian community in which the parent [and] the extended family resides," which must be applied in placing the children. F. Ct. 20. (Emphasis added.)

6) *"[T]he Tribe w[ill] cooperate in facilitating the participation of local witnesses* in the conduct of hearings before the Tribal Court through the use of trial depositions and other procedures." F. Ct. 25. (Emphasis added.)

7) The Tribe's Indian Child Welfare Coordinator will review the files of and "confer with

> those individuals associated with . . . Social Services who have been responsible for the children [to] assist in the presentation of . . . Social Services' concerns before the Tribal Court." F. Ct. 26.
>
> 8) *The foster parents* of two of the Indian children *are "willing to participate* in custody proceedings *in South Dakota."* F. Ct. 23. (Emphasis added.)
>
> 9) "The circumstances in this case do not warrant a denial of transfer based on the inconvenience or hardship to witnesses." F. Ct. 27.

App. 15-22. Recognizing the ICWA's strong preference for tribal jurisdiction, F. Ct. 42, App. 21, the family court again ordered transfer of the case to the tribal court.

The guardian[3], not social services, then appealed the decision of the family court to the state supreme court. At argument, the guardian eschewed the primary argument relied on below – that the transfer to tribal court would disrupt the long-standing foster placements[4] – and,

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[3] *See* note 2, *supra*, at p. 4 discussing the alliance between the foster parents and the guardian.

[4] The family court found that much of the lengthy delay was caused by the South Carolina courts. F. Ct. 31, App. 18. In fact, the foster parents and the guardian have caused the delay by persistently opposing the policies of the ICWA. Indeed, when the Tribe sought to expedite the review of this matter, the guardian opposed its motion. The result is that the Indian children in this case have been in non-Indian foster care for almost eight years. Yet, as this Court held in *Holyfield, supra*, at 1611, "the law cannot be applied to automatically

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instead, claimed that the transfer would cause "undue hardship to the parties and witnesses."

The state supreme court, without hearing any testimony, substituted new findings of fact without regard for the findings of the family court:

> [T]he majority of the witnesses necessary for the termination of parental rights action are located in South Carolina. . . . At the most recent family court hearing, ten witnesses testified as to the care, treatment and evaluation of the children, [including] experts, . . . the children's teachers, their *foster parents*, and neighbors of the *foster parents*. . . .
>
> *The foster parents . . . would like to adopt* [the Indian children] . . . . In attempting to show that "good cause" exists to overcome [the ICWA's Indian placement] preference, the *foster parents* will inevitably utilize testimony of *neighbors, friends, family*, teachers, social workers, and psychologists to show *their fitness as parents*, and to show how well the children have adjusted to their *foster home*. . . . Since the Tribe does not

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'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing [and protracted] litigation.' "

Whether the tribal court would reunify the family after the rehabilitation of the parents, place the children with an Indian family or with the present foster parents with visitation rights for the extended family, is for the court to determine. *Id; see, also*, National Law Journal, Feb. 25, 1991, "After the Decisions, the Litigation Goes On," p. 1, 24 (tribal court granted adoption of the children to Ms. Holyfield after deciding it was in their best interest to remain with her).

> have to show good cause to overcome the preference, it seems likely that fewer witnesses from South Dakota will be involved. (Emphasis added.)

Based on its substitute findings, the state supreme court reversed the family court and denied the transfer.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE SOUTH CAROLINA SUPREME COURT HAS JEOPARDIZED THE ABILITY OF INDIAN TRIBES TO PROTECT THEIR CHILDREN BY IGNORING THE CLEAR CONGRESSIONAL MANDATE OF THE INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1901, *ET SEQ.*, AND THIS COURT'S TEACHING IN *MISSISSIPPI BAND OF CHOCTAWS V. HOLYFIELD*, ___ U.S. ___, 109 S. CT. 1597 (1989).

A. Introduction

In *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597, 1601 (1989), this Court declared that, "[t]he heart of the ICWA [is] its provisions concerning jurisdiction over Indian child custody proceedings." The Court made clear that federal law controls these jurisdictional issues. *Id.* at 1607 ("Congress intended to provide a uniform federal law . . . for the ICWA.") Nevertheless, the state supreme court completely ignored the federal law standards in denying transfer of jurisdiction to the tribal court.

As this Court explained in *Holyfield*, § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Id.* at 1602. Congress directed that state courts *"shall transfer"*

such cases to tribal courts, unless there is "good cause" to deny the transfer. 25 U.S.C. § 1915(b) (emphasis added). The House Report clearly sets forth Congress' intention:

> The subsection is intended to permit a State court to apply a modified doctrine of forum non conveniens . . . *to insure that the rights* of the child as an Indian, the Indian parents or custodian, and the tribe *are fully protected*. (Emphasis added.)

H. R. Rep. No. 95-1386, p. 22 (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News, pp. 7530, 7544 (hereinafter "House Report"). After extensive hearings on the issue, the family court made exhaustive findings and transferred the case to tribal court. Incredibly, the state supreme court struck the carefully crafted findings of the family court and, on a cold record, substituted its own findings. In doing so, the court committed several grave errors:

1) The court denied the Indian parties due process of law when it violated the rule that "[t]he one who decides, must hear," *Morgan v. United States*, 298 U.S. 468, 481 (1936);

2) The court disregarded Congress' mandate establishing presumptive tribal court jurisdiction and created a *de facto* presumption in favor of state court jurisdiction;

3) The court failed to heed Congress' directive to fully protect the federal rights of the children as Indians, and the rights of the Indian mother and the Tribe; and

4) The court completely ignored this Court's decision in *Holyfield, supra*, that tribal jurisdiction under the ICWA must be determined by federal standards.

Although this Court in *Holyfield* carefully articulated its understanding of the Congressional intent embodied in the ICWA, the state supreme court refused to adhere to that federal policy, and found it unnecessary even to refer to *Holyfield* in its decision. Instead, the state supreme court zealously safeguarded the non-Indian foster parents and their friends, family and neighbors from inconvenience, while failing even to mention the hardship to the natural parents and the extended Indian family – the class of persons Congress intended to protect when it adopted the Act.

1) The State Supreme Court Denied the Indian Parties Due Process of Law By Making Substitute Findings of Fact Without Hearing the Live Testimony

"The right to the integrity of the family is among the most fundamental rights under the Fourteenth Amendment,"[5] House Report at 22, quoting *Davis v. Page*, 442 F. Supp. 258, 263 (S.D. Fl. 1977), and "a tribe's children are vital to its integrity and future." *Id.* at 14, approving *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975). Title 25 U.S.C. § 1911(b) was enacted to fully "protect the rights of the child as an Indian, the Indian family and the Indian tribe," and to further Indian tribal sovereignty. *See Holyfield, supra*, at 1602; House Report at 21.

Due process requires a "hearing appropriate to the nature of the case." *United States v. Raddatz*, 447 U.S. 667,

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[5] The Committee noted its view that "the removal of a child from its parents is a penalty as great, if not greater, than a criminal penalty . . . . " House Report at 16.

677 (1979). Although the family court provided the parties with the full range of procedural protections in extensive hearings, *see*, App. 13, the state supreme court's appellate review negated the due process value of those hearings by summarily dismissing the family court's findings and substituting new "find[ings] of fact in accordance with its own view of the preponderance of the evidence." In short, the state supreme court violated the rule that "[t]he one who decides must hear." *Morgan, supra*, at 481; quoted in *Raddatz, supra*, at 677.

The family court's findings regarding the transfer issue necessarily involved determinations of the weight and credibility of witnesses' testimony. The Tribe's Indian Child Welfare Coordinator's testimony, for example, supported the family court's finding that:

> Participation in hearings in Chester County, far distant from the Reservation, is both difficult and expensive for the Tribe. . . . F. Ct. 24, App. 16.

The testimony of the foster parents indicated that at least two of them "were willing to participate in custody proceedings in South Dakota," F. Ct. 23, App. 16, and two of their friends had already traveled to South Dakota to prepare for their testimony at the transfer hearing.[6] The guardian made no showing at all as to hardship.

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[6] Two of the foster parents' friends and neighbors were sent by the guardian to the Cheyenne River Sioux Tribe's headquarters to see if reservation life would be appropriate for the children. After a three hour visit in which no contact was made with the Tribe, the neighbors determined that it was not.

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In stark contrast, the state supreme court, re-weighing the testimony without seeing or hearing the witnesses, found:

> [I]f this case were to be transferred to tribal court, it would cause undue hardship by forcing numerous witnesses from South Carolina to travel to South Dakota at considerable expense and difficulty. . . . [7]

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January, 1989 T ("Tr.") at 154, 153, W. Lambert ("it looked very nil"); Tr. at 161, P. Lambert ("very little up there"); *cf. Solem v. Bartlett*, 465 U.S. 463, 480 (1984) ("The seat of tribal government is . . . where most important tribal activities take place"). The friends also testified as to the condition of the children at the time they were removed from their natural parents. Tr. 158, P. Lambert ("their playground skills were very lacking"); *compare* Tr. 208, Gottlieb (the Tribe's expert testified that people "interpret [data] with [their] own *cultural bias* instead of being culturally sensitive to the people that we are evaluating"). (Emphasis added.)

The friends' testimony runs afoul of the Congressional policy which the Court carefully explained in *Holyfield*. The ICWA ensures that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.' " *Holyfield, supra*, at 1602. The family court, which heard the testimony, gave it no weight. The state supreme court, on the other hand, found the supposed hardship to the friends to be a factor in denying transfer.

[7] The state supreme court accorded no weight to the Indian Child Welfare Coordinator's testimony regarding procedures to facilitate presentation of social services' records and recommendations to tribal court, despite the family court's finding that these procedures "would assist in the presentation" of social services' concerns. F. Ct. 26, App. 17.

The court also gave no weight at all to vital testimony presented to the family court concerning the federal rights of the children as Indians, the Indian mother and the Tribe. For example, the Tribe presented testimony that the rehabilitation of the parents was possible, indeed likely. *See* 25 U.S.C. § 1915(d). The Tribe's expert testified that his "reputation is working with people who do deny [sexual] abuse," and his "success rate with denying offenders is probably 90%." Tr. 210, 212, Gottlieb. In contrast, the social services worker testified that "the plan is for termination of parental rights because . . . Mr. and Mrs. Coleman have such a denial system set up regarding the abuse [that] there is no possibility that they would be able to be treated. . . . " 10/86 Tr. 60, Beatty. The presentation of that testimony plainly weighed heavily in the family court's decision to transfer the case to tribal court.[8]

Thus, this case presents the issue reserved in *Raddatz, supra*, at 681 n.7: May an appellate court, consistent with due process, substitute its determinations for those of a trial court as to the weight and credibility of live witnesses on dispositive issues? The Tribe respectfully submits that in these circumstances, such procedures violate due process. The interests of the Indian children, the Indian family and the Tribe are of the greatest import: the

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[8] Unlike the family court, the state supreme court viewed "the attempt to rehabilitate the parents" as something already passed. Thus, although the family court gave great weight to the testimony of the Tribe's expert on child abuse treatment, the supreme court accorded his testimony no weight whatsoever. *Compare* F. Ct. 34, 35; App. 19 with App. 6-8.

integrity of the family and the Tribe. Therefore, the children, their family and the Tribe have a "commanding" interest in the fairness and the accuracy of the court's decision.[9] *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). The national interest in preventing the break-up of Indian families, 25 U.S.C. § 1902, and the minimal burden imposed in requiring appellate court deference to trial court findings of fact[10] support their interests. *Matthews v. Elderidge*, 424 U.S. 319, 335 (1976). The rule that "[t]he one who decides must hear" is an essential part of due process in these circumstances. *Morgan, supra; see Raddatz, supra*, at 679 ("More than 100 years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading notes of the witnesses' prior testimony").

2) The State Supreme Court Disregarded Congress' Mandate in Favor of Tribal Jurisdiction and Created a *De Facto* Preference For State Court Jurisdiction Solely for the Benefit of Non-Indian Foster Parents

Tribal relations and strong bonds to extended family members are essential parts of Indian life. Congress

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[9] The state supreme court's appellate review creates a serious risk of error. For example, the supreme court's findings erroneously suggest that treatment had been arranged for the children by social services. However, the record clearly reflects that no counseling or treatment has been provided to the children and accordingly, the family court specifically found that "[s]ocial services has not provided the children any counseling or therapy to date." F. Ct. 36; App. 19.

[10] A deferential standard of review on appeal would very likely reduce the burden on the appellate courts by reducing litigants' incentive to take "a fresh bite at the apple," and increasing the opportunity for summary review.

recognized the full significance of these tribal relationships: "An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close responsible members of the family," House Report at 10, and "[b]y sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child." *Id.* at 11. By the same token, the Indian family is "the wellspring of [the] future" for Indian tribes. *Id.* at 19.

To protect tribal relations from disintegration at the hands of outside agencies[11], Congress established a comprehensive scheme of protections for the Indian child, the Indian family and their Tribe, including: exclusive/presumptive tribal court jurisdiction; mandatory provision of rehabilitative services to Indian parents; Indian foster care and adoptive placement preferences and a provision establishing tribal social and cultural norms as the standard for meeting those preference requirements. 25 U.S.C. § 1911, *et seq.*

Section 1911(b), which creates presumptive tribal court jurisdiction when Indian children are domiciled off-reservation, is at the heart of Congress' protective scheme. *Holyfield, supra,* at 1602. Transfer is mandatory, "absent good cause to the contrary." Congress intended

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[11] In *Holyfield, supra,* at 1606, the Court explained that: "Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities." Rep. Udall, the ICWA's sponsor, recognized that " 'state courts and agencies and their procedures share a large part of the responsibility' for the crisis threatening the future and integrity of Indian tribes and Indian families.' " *Id.* at n.18.

"to insure that the rights of the child as an Indian, the Indian parents or custodian, and the Tribe *are fully protected."* House Report at 21[12] (emphasis added).

The state supreme court refused to recognize the comprehensive nature of Congress' protective scheme, and failed to give any consideration to the protection of the federal rights created by the ICWA.[13] Even more troubling is the rationale actually employed by the court, which makes the Indian placement preference of 25 U.S.C. § 1915 an obstacle to presumptive tribal court jurisdiction in order to protect the placement of Indian children with non-Indian foster parents:

> *The foster parents* in South Carolina who currently have custody of the children *would like to adopt them.* However, the Indian Child Welfare Act provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (1978). In attempting to show that "good cause" exists to overcome this preference, the *foster parents* will inevitably utilize testimony of neighbors, friends, family, teachers, social workers and psychologists to show their fitness as parents, to show how well

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[12] Thus, Congress placed the burden on those opposing transfer to tribal court to prove by "clear and convincing evidence" that there is "good cause" to deny the transfer. *Matter of M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981). The state supreme court applied the wrong standard of proof; preponderance of the evidence. Thus, the decision in this case conflicts with the decision of the Montana Supreme Court. *Id.*

[13] *See* Discussion at Section 3, *infra*, p. 17.

> the children have adjusted to their *foster home*, and to show the impact on the children of removing them from their *foster home*. All of these witnesses would have to travel to South Dakota for the adoptive placement hearing. Since the Tribe does not have to show good cause to overcome the preference, it seems likely that fewer witnesses from South Dakota will be involved. (Emphasis added.)

To paraphrase the court's rationale, Indian child custody cases involving non-Indian foster parents should be heard in state courts because, as non-Indians, the foster parents will have to overcome the preference for Indian placement. Thus, the state supreme court established, *de facto*, a presumptive state court jurisdiction in Indian child custody cases solely for the benefit of non-Indian foster parents. In essence, this state supreme court decision transforms the Federal Indian Child Welfare Act into the "State Non-Indian Foster Placement Preservation Act."

Sections 1911(b) and 1915(a) are complimentary parts of the same Congressional plan to prevent the break-up of Indian families and to reduce the placement of Indian children by state agencies outside tribal society in non-Indian foster homes. *Id.* at 1602. The state supreme court's decision jeopardizes the ability of Indian tribes to protect their relations with their children by reversing the Congressional presumption in favor of tribal court jurisdiction.

3) The State Supreme Court Refused to Consider the Rights of the Indian Children as Indians, the Indian Parent and the Indian Tribe

"The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected," *Holyfield, supra,* at 1609 n.24, quoting *In re Appeal of Pima County Juvenile Action,* 130 Ariz. 202, 204, 635 P.2d 187, 189 (App. 1981), and expresses a federal legislative judgment that "the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parent." *Holyfield, supra,* at 1610, quoting *In re Adoption of Holloway,* 732 P.2d 962, 969-70 (Utah 1986).

As noted above, the purpose of the "good cause" exception to the presumptive tribal court jurisdiction established by section 1911(b) is *"to insure that the rights* of the child as an Indian, the Indian parents . . . and the tribe *are fully protected."*[14] House Report at 21 (emphasis added). The statutory language and legislative history of the ICWA make clear that those rights include the interests in: 1) tribal custodial decision-making over Indian children, 25 U.S.C. § 1911; 2) rehabilitation of Indian

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[14] The House Report's section-by-section analysis explains: "The section seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report at 23. This language directly corresponds with the explanation of § 1911(b), and the sections must be read together to give effect to Congress' intent. *See, also,* House Report at 22 (§ 1912(d) creates a "Federal requirement . . . with respect to Indian children and families.")

parents and reunification of Indian families, 25 U.S.C. §§ 1912(d), 1914 and 1916; 3) placement of Indian children with Indian families, 25 U.S.C. § 1915; and 4) recognition of tribal social and cultural standards. 25 U.S.C. § 1915(d); *see, generally,* House Report at 21-24. Analysis of petitions to transfer Indian child custody cases to tribal courts must include careful consideration of whether the state or the tribal court is "better equipped" to protect these federal rights. *See* F. Ct. 41, App. 21.

a. Rehabilitation of the Parents

Section 1915(d) creates a "Federal requirement" that state agencies make "*active efforts* to provide assistance designed to prevent the breakup of Indian families." House Report at 22. In the present case, the natural parents have resided in South Dakota for the past five years. Travel to South Carolina is difficult for them due to their employment responsibilities. Social services, although recognizing the obligation to provide rehabilitative services, has not provided active rehabilitative services since initiating the action to terminate parental rights based on its belief that the natural parents cannot be rehabilitated because they deny that they abused the children. Tr. 32, Beatty; Tr. 187, Wandersman. In contrast, the Tribe identified an expert who specializes in treating abusive parents, and has a 90% success rate even in difficult cases where the parents deny the abuse. Tr. 212, Gottlieb. Reunification of the children with their natural parents is admittedly the ideal result in this case. Tr. 182-184, Wandersman. The Tribe clearly is in a better position to provide the rehabilitative services which are

necessary to reunify the family, and if the Tribe were successful, this case would proceed no further.

The family court considered the issue at length and found that there still exists "a possibility of rehabilitation and reuniting of the children and the parents." F. Ct. 34; App. 19. Yet, social services did not submit any proposal to provide rehabilitative efforts to the parents, and indeed, has already requested that the termination action be set for trial. Unfortunately, the state supreme court proceeded in like fashion, failing even to mention the possible rehabilitation of the parents or the reunification of this Indian family.

b. Protection of the Indian Children's Relations with their Tribe and the Tribe's Contacts with its Children

Section 1915(a) provides preference in the placement of Indian children for adoption with:

1) a member of the child's extended family;

2) other members of the Indian child's tribe; and

3) other Indian families.

Section 1915(b) provides similar preferences in the placement of Indian children in foster care.

The record demonstrates that if these Indian children are to be placed with extended Indian family members or another Indian foster or adoptive parent, that placement will necessarily be in South Dakota. The Indian Child Welfare Coordinator of the Tribe testified that he had been contacted by the grandfathers, aunts, uncles and

other Cheyenne River Sioux relatives of the children concerning the children's placement, Lends His Horse, Tr. 87, while social services admitted that there were no available Indian foster care placements in South Carolina. On that basis, the family court found:

> All of the blood kin of the children . . . are living in South Dakota. . . . The Indian heritage, to which these children are entitled, is on the Sioux Nation in the State of South Dakota. F. Ct. Sum.; App. 22.

Again, the children's right to maintain their tribal relations and the Tribe's right to keep its children within its society weighs heavily in favor of tribal jurisdiction, yet the state supreme court wholly ignored the witnesses' testimony and the family court's finding.

c. Tribal Social and Cultural Standards

Section 1915(d) requires that "the standards to be applied in meeting the [placement] preferences . . . shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides. . . . " The purpose of the subsection is to insure that Indian children's interest in placement with Indian families is not precluded by the application of "white, middle-class" standards. *Holyfield, supra,* at 1602.

Without doubt, the tribal court is better equipped to apply the prevailing social and cultural standards of the Cheyenne River Sioux Community than is the family court in South Carolina, and the family court, conducting the appropriate section 1911(b) analysis, emphatically agreed:

> Social services could not "locate anyone with expertise relative [to] the prevailing social and cultural standards of the Indian community in which the parent or extended family resides," and "[t]he Tribal Court is better equipped to deal with the delicate balancing of the [issues under the ICWA] than is [the family court]." F. Ct. 20, 41; App. 16, 21.

The state supreme court also failed to consider this issue. Indeed, the supreme court's opinion suggests that the local norms of the Rock Hill, South Carolina community are accorded more weight than tribal social and cultural standards.[15]

4) The State Supreme Court Completely Ignored the *Holyfield* Mandate that Presumptive Tribal Jurisdiction Must be Measured by Federal Law Standards

This Court's ruling in *Holyfield* is: Federal law defines the rights Congress created for Indian families and Indian tribes in the ICWA. *Holyfield*, *supra*, at 1607-10; *cf. Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) (federal courts have "no occasion to look to state law" definitions in applying 28 U.S.C. § 1404(a)). In the present case, the state supreme court gravely erred in disregarding these federal rights, *see* Discussion at Sections 2 and 3, *supra*, based on its view that section 1911(b) modified the doctrine of forum non conveniens no further than to permit "state courts to

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[15] "[T]he foster parents will inevitably utilize testimony of neighbors, friends, family, teachers, social workers and psychologists to show their fitness as parents. . . . [I]t seems likely that fewer witnesses from South Dakota will be involved." App. 7.

determine whether the tribal court is a less convenient forum." App. 6. The supreme court then merely speculated that "fewer witnesses from South Dakota" would be called. The state supreme court's analysis utterly fails to meet the federal standards of even an *unmodified* forum non conveniens test.

Congress established a statutory federal doctrine of forum non conveniens in 28 U.S.C. § 1404(a):

> For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division. . . .

Therefore, in determining transfer motions made pursuant to § 1404(a), federal courts consider: 1) the convenience of the parties; 2) the convenience of the witnesses; and 3) the interests of justice. *See* Revisers Note to 28 U.S.C. § 1404(a); *cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *see*, C. Wright, A. Miller and E. Cooper, 15 *Federal Practice and Procedure* § 3841, *et seq.* The balance of convenience must "greatly favor" the moving party to overcome the presumption in favor of the plaintiff's choice of forum. *See, e.g., Anonymous v. F.D.I.C.*, 617 F. Supp. 509, 512 (D.D.C. 1985). In the context of the ICWA, Congress has established a statutory presumption in favor of the tribal court as the forum for determining Indian child custody cases and the burden of proof is on the party opposing presumptive tribal court jurisdiction. 25 U.S.C. § 1911(b); *see* note 12, *supra*, at p. 15.

a. Convenience of the Parties

In this case, the convenience of the parties is clearly served by transfer of the case to tribal court. First,

Congress has recognized that the Tribe's interests are "as entitled to respect as are the interests of the parents," *Holyfield, supra,* at 1610, and the Tribe presented evidence that it is both difficult and expensive for the Tribe and the Indian Child Welfare Coordinator to run the gauntlet of state court proceedings in South Carolina. Second, the natural parents live in South Dakota, and they have difficulty travelling to South Carolina due to their employment responsibilities. The natural parents clearly are essential to the next stage of proceedings in this case, whether that involves rehabilitation and reunification of the Indian family or termination of parental rights and adoptive placement.[16]

In contrast, the only South Carolina party to the proceedings is social services and the record demonstrates that the Tribe has "ample procedures" to facilitate the presentation of social services' views to the tribal court. F. Ct. 27, App. 17. The record also indicates that if the case is transferred to tribal court, the Cheyenne River Agency Bureau of Indian Affairs social service personnel will fill the role played by social services in the state proceedings.

b. Convenience of the Witnesses

As to the materiality of the testimony of social services' personnel, it is clear that Bea Beatty has had the

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[16] It should be noted that termination of parental rights actions under the ICWA require proof "beyond a reasonable doubt," 25 U.S.C. § 1912(f), and in the criminal proceeding against the parents where the same standard of proof was employed, 11 of 12 jurors voted for acquittal.

primary responsibility for this case since the outset and her convenience should have been balanced against the convenience of the Tribe's Indian Child Welfare Coordinator in determining the transfer issue. Similarly, although the state supreme court found that the "majority of witnesses" necessary for the termination of parental rights action are located in South Carolina, App. 6, the family court's decision of February 28, 1986, demonstrates that the only essential South Carolina witness is Dr. Schuh, the medical expert who conducted the physical and psychological examination of the children. App. 41-42. As an expert witness, her locale is entitled to little or no weight. *E.g., In re Ralston Purina Co.*, 726 F.2d 1002, 1006 (4th Cir. 1986).

More importantly, the state supreme court never considered that the children's natural parents will "inevitably" call witnesses to testify to their fitness as parents at any hearing to terminate parental rights.[17] Since the natural parents have been living with their other children in South Dakota for the past several years, these witnesses would necessarily be from South Dakota. *Cf.* App. 22 ("All of the blood kin . . . live in South Dakota."); *In re Appeal of Pima County, supra,* at 192 ("the issue in these termination proceedings is not the fitness of the adoptive

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[17] In contrast, the supreme court placed great weight on its view that "the foster parents will inevitably utilize the testimony of neighbors, friends, family . . . to show their fitness as parents." App. 7. Indeed, the court based its denial of transfer to tribal court, in large part, upon findings regarding the need to provide for the convenience of the non-Indian foster parents and their neighbors, friends and family. *See* App. 7.

parents, but rather the unfitness of the parent whose relationship is sought to be terminated.").

Finally, the state supreme court failed to accord any weight to the extended Indian family. The record is clear that the maternal grandparents, aunts and uncles, and the children's other Cheyenne River Sioux relatives are interested in the custody of these children. Thus, there is no basis for the court's speculation that "fewer witnesses from South Dakota will be involved" if adoptive placement should become necessary.

c. The Interests of Justice

Under § 1404(a), the interests of justice are often a controlling factor. *See*, C. Wright, A. Miller, E. Cooper, *supra*, at § 3854. In the present case, Congress has emphatically declared the *national interest* in preventing the breakup of Indian tribal and familial relations, and the natural parents have fundamental interests, under the Fourteenth Amendment, in maintaining their parental rights. As demonstrated above, the tribal court is ready and willing to make efforts to rehabilitate the parents and reunite the family. Alternatively, if those efforts were not successful, the tribal court is in a far better position to take the necessary steps to retain the children within its society than is the state court. Clearly, the interests of justice favor the forum that can best protect these Indian tribal and familial relations – that forum is the tribal court.[18]

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[18] The federal courts have also considered promptness in the disposition of the case and familiarity with local law in

(Continued on following page)

In sum, the convenience of the parties clearly favors the tribal court because the natural parents and the Tribe are located on the Cheyenne River Indian Reservation, the convenience of the witnesses favors the tribal court and the interests of justice favor the tribal court. The state supreme court wholly failed to consider the federal forum non conveniens standards in determining the transfer issue. Instead, the court relied on an impermissible "battle of numbers," *cf. American Standard, Inc. v. Bendix Corp.*, 487 F. Supp. 254, 263 (D.C. Mo. 1980), to supersede the clear mandate of this Court's decision in *Holyfield* and make the interests of the non-Indian foster parents paramount over the interests of the natural parents and the Tribe.

CONCLUSION

The refusal of the South Carolina Supreme Court to recognize and adhere to the "policy of this Nation to protect the best interests of Indian children and to

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(Continued from previous page)

determining the interests of justice. *Parsons v. Chesapeake & O.R. Co.*, 375 U.S. 71 (1963); *Gulf Oil Corp. v. Gilbert, supra*, at 508. These factors also favor tribal court resolution of this case. The Tribe's Indian Child Welfare Coordinator testified in October, 1986 that "[i]f this had happened on the Cheyenne River Reservation, it would have been taken care of right away. If it had been proved that these children were sexually abused, it would have gone to Federal Court right away." 10/86 T. 55. Similarly, the tribal court's greater familiarity with the prevailing tribal social and cultural standards cannot be gainsaid.

promote the stability and security of Indian tribes and families" through the aegis of the Indian Child Welfare Act is particularly eggregious. The state supreme court employed an appellate procedure which violated the due process rights of the Indian parties, reversed the presumptive tribal jurisdiction mandated by Congress in favor of a judicial presumption of state court jurisdiction – solely for the benefit of non-Indian foster parents – and rejected the teachings of this Court's decision in *Mississippi Band of Choctaws v. Holyfield*, ___ U.S. ___, 109 S.Ct. 1597 (1989) without even a reference. In sum, the state supreme court transformed the Federal Indian Child Welfare Act into a "State Non-Indian Foster Placement Preservation Act." Thus, whether through plenary review or summary dismissal, the state supreme court's decision warrants reversal.

Dated: March 11, 1991

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1990

INDIAN CHILD WELFARE COORDINATOR
OF THE JUVENILES COURT OF THE
CHEYENNE RIVER SIOUX TRIBE, ET AL.

Petitioners,

v.

CHESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES, ET AL.

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Chester County Department of Social Services,

Respondent,

v.

Joe L. Coleman, Phyllis Coleman and Dorothy Clark, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court,

Respondents.

In Re:

Billie Joe Morrison, DOB: 1-1-78, Tara Morrison, DOB: 5-9-79, Jaqueline Coleman, DOB: 10-26-81, Heather Coleman, DOB: 1-31-83, all minor children under the age of Eighteen (18) years.

Of whom Billie Joe Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, by any through their dully appointed Guardian Ad Litem Richard M. Steele, are

Appellants.

Appeal From Chester County
Thomas B. Barrineau, Family Court Judge

Opinion No. 23297
Heard September 25, 1990 –
Filed December 10, 1990

REVERSED

Robert Marshall Jones, of Rock Hill, for Appellants.

Claude S. Coleman, of Chester County Dept. of Social Services, of Chester, for Respondent.

Scott B. McElroy, of Boulder, CO., and George M. Hearn, of Conway, both for Respondents Dorothy Clark, and Cheyenne River Sioux Tribe.

Joe and Phyllis Coleman, of Howes, South Dakota, *pro se.*

PER CURIAM: This case involves the application of the Indian Child Welfare Act.[1] The sole issue is whether the family court erred in transferring jurisdiction of the case to the Cheyenne River Sioux Tribe (Tribe), in South Dakota. We reverse the order of the family court.

I. FACTS

This case involves the application of the Indian Child Welfare Act to proceedings in Chester County regarding the removal of four Indian children from their parents. The proceedings in this case are complicated and have been protracted. However, a brief summary of pertinent portions of the proceedings is necessary. The children were removed from their parents in November, 1983, due to physical abuse. Since that time, they have remained in temporary foster care in South Carolina, pending the outcome of this case. In September, 1985, the Department of Social Services also alleged sexual abuse. Efforts to rehabilitate the parents were unsuccessful, but parental rights were not terminated because the parents, Joe and

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[1] 25 U.S.C. § 1901 *et seq.* (1978).

Phyllis Coleman,[2] moved to transfer jurisdiction to the Cheyenne River Sioux Tribal Court pursuant to the Indian Child Welfare Act. The Indian Child Welfare Act mandates that certain state court proceedings be transferred to the jurisdiction of the child's tribe, absent good cause. 25 U.S.C. § 1911(b) (1978). After a hearing, the family court issued an order on November 10, 1986, requiring the transfer of custody and jurisdiction of the children to the Tribe.

This order was then stayed by the family court pending a final decision on appeal. On September 26, 1988, the Court of Appeals rendered an opinion remanding the case to family court to consider factors which might constitute "good cause" for the family court to retain jurisdiction. *Chester County Dept. of Social Services v. Coleman*, 296 S.C. 355, 372 S.E.2d 912 (1988). The family court held a hearing and on April 5, 1989, issued an order finding that "good cause" did not exist to retain jurisdiction, and ordering custody of the children transferred to the Tribe. The family court denied a motion for supersedeas made by the guardian ad litem on behalf of the children. On July 21, 1989, we granted the guardian ad litem's motion for supersedeas.

II. DISCUSSION

The sole issue presented is whether jurisdiction should be transferred to the tribal court pursuant to the Indian Child Welfare Act which provides that:

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[2] Phyllis Coleman is the mother of all four children. Joe Coleman is the father of only the two youngest children.

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe.

25 U.S.C. § 1911(b) (1978).

This Act was enacted because large numbers of Indian children were being separated from their families and tribes caused by adoption and foster care placement in non-Indian homes be state welfare entities. 25 U.S.C. § 1901(4) (1978). To remedy this problem, the Act provides Indian tribes with a central role in custody proceedings involving Indian children. Thus, proceedings involving Indian children must be transferred to the jurisdiction of the Indian child's tribe, "in the absence of good cause to the contrary". 25 U.S.C. § 1911(b) (1978).

"Good cause" is not defined in the Act itself. However, the legislative history states that the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a child custody proceeding involving an Indian child. S. Rep. No. 597, 95th Cong., 1st Sess. 17 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530. The Bureau of Indian Affairs (BIA) published non-binding guidelines to aid state courts in interpreting the Act. (BIA Guidelines) *See* Guidelines for State Court; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (1979). The BIA Guidelines list several factors which may constitute "good cause" to deny transfer of jurisdiction to a tribal court. 44 Fed. Reg. at 67591. Appellant argues that "good cause" exists to deny transfer of jurisdiction under the BIA Guidelines,

because the case "could not be adequately presented to the tribal court without undue hardship to the parties and the witnesses." 44 Fed. Reg. at 67591, Guideline (b)(iii) (1979). The commentary to this BIA Guidelines points out that:

> Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "[t]he subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."

44 Fed. Reg. at 67591.

The doctrine of *forum non conveniens* is modified in the Indian child custody context so as to allow state courts to determine whether the tribal court is a less convenient forum. The BIA Guidelines acknowledge that "application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. at 67591.

The family court determined that a denial of transfer of jurisdiction was not warranted based on the inconvenience or hardship to witnesses, because it would be "far more difficult for the Tribe to participate in these proceedings" in South Carolina than for the South Carolina witnesses to testify in South Dakota. We disagree.

Several courts have held that "good cause to deny transfer of jurisdiction to the tribal court may arise from geographical obstacles." *In Interest of J.R.H.*, 358 N.W.2d

311, 317 (Iowa 1984). In the case of *Matter of Wayne R. N.*, 107 N.M. 341, 757 P.2d 1333 (N.M. App. 1988), the New Mexico court denied a transfer to the tribal court, noting that if the "case were to be transferred to the tribal court, the witnesses would all be forced to travel to Oklahoma, at considerable expense and difficulty." *Id.* 757 P.2d at 1336. In the case of *Matter of N. L.*, 754 P.2d 863 (Okl. 1988), the Oklahoma court denied a request for transfer to a tribal court, finding that "good cause to deny a transfer has been found where almost all the parties and witnesses reside in the county of the state court and have no contact with the tribal court." 754 P.2d at 869. *See also In re Robert T.*, 200 Cal. App.3d 657, 246 Cal. Rptr. 168 (1988) (holding that proximity of the court to the numerous records and witnesses in the proceedings are pertinent and adequate reasons to deny transfer); *People in Interest of J. J.*, 454 N.W.2d 317 (S.D. 1990) (upholding trial court's determination that evidence could not be adequately presented to tribal court without undue hardship to parties and witnesses).

Here, the bulk of the evidence and the majority of the witnesses necessary for the termination of parental rights action are located in South Carolina. South Carolina, through the Department of Social Services, has had extensive contact with the family unit. The Department of Social Services was involved in the physical and sexual abuse hearings, in the attempt to rehabilitate the parents, and in evaluating and treating the children. Throughout the various hearings involving these children, there has been extensive testimony from experts, including doctors, psychologists, social workers, and child abuse specialists. At the most recent family court hearing, ten witnesses

testified as to the care, treatment and evaluation of the children over the prior six years. These witnesses included experts as well as the children's teachers, their foster parents, and neighbors of the foster parents. All of the witnesses to the physical and sexual abuse, as well as records of treatment and evaluation are located in South Carolina, while the tribal court is located several thousand miles away in South Dakota.

If parental rights are terminated, there will be an adoptive placement hearing. The proceedings for adoptive placement will involve testimony from witnesses from both South Carolina and South Dakota. The foster parents in South Carolina who currently have custody of the children would like to adopt them. However, the Indian Child Welfare Act provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (1978). In attempting to show that "good cause" exists to overcome this preference, the foster parents will inevitably utilize testimony of neighbors, friends, family, teachers, social workers, and psychologists to show their fitness as parents, to show how well the children have adjusted to their foster home, and to show the impact on the children of removing them from their foster home. All of these witnesses would have to travel to South Dakota for the adoptive placement hearing. Since the Tribe does not have to show good cause to overcome the preference, it seems likely that fewer witnesses from South Dakota will be involved.

In appeals from the family court, this Court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. *Miller v. Miller*, 299 S.C. 307, 384 S.E.2d 715 (1989). We find that the facts demonstrate that if this case were to be transferred to the tribal court, it would cause undue hardship by forcing numerous witnesses from South Carolina to travel to South Dakota at considerable expense and difficulty. We realize that by retaining jurisdiction, we are imposing some hardship on the parties and witnesses from South Dakota. However, this case has been in our court system seven years, during which time numerous hearings have been held, and volumes of records have been compilated. In addition, there are at least a dozen witnesses in this State who have had extensive contact with the children and with this case. These witnesses have been in close contact with the children and will be able to provide invaluable testimony in the future proceedings. Thus, we conclude that it is imminently more practical to allow the case to proceed in South Carolina. Based on the foregoing, we find that good cause was shown to deny the transfer. Accordingly the order of the family court is

REVERSED.

/s/ David W. Harwell A.C.J.
/s/ A. Lee Chandler A.J.
/s/ Ernest A Finney Jr. A.J.
/s/ Jean H. Toal A.J.
/s/ James E. Moore A.A.J.

STATE OF SOUTH CAROLINA COUNTY OF CHESTER	)	IN THE FAMILY COURT No. 83-DR-12-400
Chester County Department of Social Services, Petitioner, vs. Joe L. Coleman, Phyllis Coleman and Joe Lends His Horse, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court, Respondents. In Re: Billie Jo Morrison, DOB: 1-1-78 Tara Morrison, DOB: 5-9-79, Jacqueline Coleman, DOB: 10-26-81 Heather Coleman, DOB: 1-31-83, all minor children under the age of eighteen (18) years.	)	PROPOSED FINDINGS OF FACTS AND ORDER SUBMITTED BY THE CHEYENNE RIVER SIOUX TRIBE and JOE LENDS HIS HORSE, INDIAN CHILD WELFARE ACT COORDINATOR

I. HISTORY OF THE CASE

1. This case involves the custody of four children. The oldest is Billie Jo Morrison, eleven years of age. Tara Morrison is nine years old. Jacqueline Coleman is seven years old, and Heather Coleman is six years old. Joe Coleman is the natural father of Jacqueline and Heather. Phyllis Coleman is the mother of all four children who are enrolled members of the Cheyenne River Sioux Tribe.

2. On November 11, 1983, the State of South Carolina filed its first motion for removal of the four minor Indian children from the Coleman's home. On November 15, 1983, a 10-day hearing was held and thereafter the

Indian children remained in the custody of the Department of Social Services.

3. On December 12, 1983, Ms. Cindy Hord was appointed guardian ad litem for the Indian children, with Mr. Lamar H. Kelsey, III, appointed as her attorney. On December 22, 1983, a merit hearing occurred before Judge Mobley, to whom the case was then assigned, who continued custody with Social Services.

4. In May, 1984, South Carolina Social Services filed a petition seeking the return of the Indian Children to their parents. The agency alleged that the parents had cooperated with them and had fulfilled the prescribed treatment objectives, which would have allowed the children to be returned to their parents' care. Shortly thereafter, new allegations of parental sexual abuse of the children surfaced.

5. In July, 1984, the Cheyenne River Sioux Juvenile Court ("the Tribal Court") petitioned to intervene in this case, requested transfer of jurisdiction to the Tribal Court, and issued an Order purporting to place the Indian children in the care and custody of their grandparents, who live on the Cheyenne River Sioux Reservation. Shortly thereafter, on July 10, 1984, Judge Mobley considered whether to transfer jurisdiction to the Cheyenne River Sioux Tribe. He declined to transfer the case at the conclusion of that hearing.

6. In the meantime, the Indian children remained with their foster parents while the allegations of parental sexual abuse were investigated. In April, 1985, the Colemans were tried in South Carolina State Court for criminal sexual conduct with respect to the two oldest Indian

children. A mistrial resulted due to a hung jury. Thereafter, the State dropped the criminal proceedings.

7. A hearing before the Family Court was held in February, 1986, on the merits of the abuse allegations by the State against the Indian children's mother and her husband, and the issue of transfer of jurisdiction was again raised. The court responded by issuing an Order which required transfer of the children and the files to " . . . an appropriate corresponding agency in a state near the tribal lands of the minor children for placement according to the policies established by the Indian Child Welfare Act of 1978, as amended." Order, para. 3, February 28, 1986. The State's Social Services' Department contacted the State of South Dakota, which declined to accept the case because it advised that it lacked jurisdiction over reservation Indian children.

8. Thereafter, the State of South Carolina requested a hearing on the placement of the children. This hearing occurred on October 1, 1986.

9. On November 10, 1986, the Family Court issued its Order requiring the transfer of custody and jurisdiction to the Cheyenne River Sioux Tribe by December 3, 1986. Prior to transfer, counsel for the foster parents (Mr. Jones) moved for a stay of the transfer order pursuant to Supreme Court Rule 41. Attorney for the guardian ad litem and the children (Mr. Kelsey) presented a written motion for stay and the attorney for the Chester County Department of Social Services orally joined the request for a stay of the transfer, pending the outcome of the appeal. The stay was granted, pending appeal.

10. On March 31, 1987, guardian ad litem Cindy Hord and attorney for the guardian and children, Mr. Kelsey, moved to withdraw and requested that substitute counsel, Mr. Jones (formerly the foster parents' attorney) be permitted to enter his appearance, along with substitute guardian ad litem, Richard M. Steele.

11. On May 21, 1987, guardian ad litem Cindy Hord and Mr. Kelsey were relieved of their duties, pursuant to Court Order; Mr. Steele was designated new guardian ad litem and Mr. Jones was allowed to serve as his attorney.

12. Following briefing and oral argument, the Court of Appeals issued a decision reversing and remanding for "a redetermination of the issue" because it could not "make [a] factual determination on the record before [it]" on the question of whether good cause to the contrary existed which would justify refusing to transfer the matter to the Tribal Court. The Court directed:

> In this case, the family court failed to consider the various factors which may constitute "good cause" under the statute. This was error. What little we are able to glean from the record indicates that a biological parent of the two older girls, both of whom are over five years of age, may be unavailable; that none of the children has had any contact with the tribe or has resided on the reservation for a significant period of time; and that the material witnesses and evidence relating to placement are in South Carolina, not South Dakota. These factors, together with evidence that removal of the children would be disruptive and detrimental to their best interests, may well constitute "good cause" for the family court to retain jurisdiction of the case.

> Because we are unable to make this factual determination on the record before us, we reverse and remand for a redetermination of the issue. In deciding if "good cause to the contrary" exists or not, the family court should make specific findings on the factors outlined above.

Chester County Department of Social Services v. Coleman, Opinion at 13 (Court of Appeals, Sept. 26, 1988).

13. A hearing in response to that order was held in this Court on January 19 and 20, 1989. At that hearing, evidence and argument was presented by the Tribe, the guardian ad litem and the Department of Social Services.

14. Prior to the hearing, the Tribe filed a Motion in Limine contending that consideration of evidence of the impact of the removal on the children was not appropriate under the terms of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* ("the ICWA") contending principally that such matters were relevant in a custody or placement hearing but were not relevant to determining which court had jurisdiction. At the hearing, the Tribe agreed to the presentation of evidence on this issue in order to ensure that an adequate record was developed for the Court of Appeals, provided that its agreement would not be viewed as a concession on its part as to the relevance of such matters. All parties agreed to this arrangement and in fact, the Tribe presented evidence on the possible impact on the children of various custody arrangements.

II. THE BUREAU OF INDIAN AFFAIRS GUIDELINES

15. The Bureau of Indian Affairs Guidelines provide:

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

44 Fed. Reg. 67591 (1979).

16. In the present instance, it is plain that the Cheyenne River Sioux Tribe has a court and therefore section

C.3. (a) does not support a refusal to deny transfer to the Tribal Court.

17. Here the Tribe intervened in July, 1984, shortly after it became apparent that the Department of Social Services would not be able to reunite the children with the parents as originally contemplated and that the separation of the children from their parents might continue for some time. Ms. Bea Beaty testified that the Department of Social Services had originally contemplated returning the children to the Colemans in May or June of 1984 and the Tribe intervened in July, 1984. Mr. Lends His Horse testified that the Tribe is concerned under the ICWA about the separation of a child from its family for a substantial period of time. He further testified that the Tribe has limited resources for its program and that it seeks to determine the nature of the separation before intervening. Under these circumstances, the Tribe intervened and asked for a transfer to the Tribal Court in a timely fashion and Section C.3.(b)(i) provides no basis to deny transfer to the Tribal Court.

18. None of the children are over 12 years of age and thus section C.3.b(ii) is inapplicable.

19. Section C.3.(b)(iii) of the Guidelines permits the court

> "to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Section C.3. Commentary, 44 Fed. Reg. 67591.

20. Section 1915 of the ICWA mandates placement of these children with Indian families in the absence of good cause to the contrary. Section 1915 (d) requires a court to apply these requirements based on "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and culture ties." Ms. Beaty testified that she had been unable to locate any one with any expertise relative to those standards in or around Chester County.

21. Ms. Beaty further testified that Phyllis and Joe Coleman now reside on the Cheyenne River Sioux Reservation in South Dakota.

22. Ms. Lillian Whitehead, a sister of Stella Redwine, the foster mother of the two Morrison children, testified that she would "try" to go to South Dakota to testify in any proceeding concerning custody of the children.

23. Mr. Robert Redwine, the foster father of the two Morrison children said that the Redwines were willing to participate in custody proceedings in South Dakota.

24. Participation in hearings in Chester County, far distant from the Reservation, is both difficult and expensive for the Tribe.

25. Counsel for the Tribe represented that the Tribe would cooperate in facilitating the participation of local witnesses in the conduct of hearings before the Tribal Court through the use of trial depositions and other procedures.

26. Mr. Lends His Horse testified that in considering the placement of the children he would want to review the complete files of the Chester County Department of Social Services and to confer with those individuals associated with the Department of Social Services who have been responsible for the children. This procedure would assist in the presentation of the Department of Social Services' concerns before the Tribal Court.

27. There is no evidence suggesting that interest sought to be protected by Section C.3.(b)(iii) would be injured by transfer to the Tribal Court. While undoubtedly difficult for the South Carolina witnesses to physically testify in South Dakota, ample procedures exist to mitigate those hardships. On the other hand, it is far more difficult for the Tribe to participate in these proceedings yet the ICWA mandates tribal participation. I find that the circumstances in this case do not warrant a denial of transfer based on the inconvenience or hardship to witnesses.

28. Finally, Section C.3.(b)(iv) is not applicable since the mother of the four children, who is a member of the Tribe, is available and the children were raised by her prior to the institution of these proceedings.

29. Considerable testimony was elicited concerning the present placement of the children in the two foster homes and the impact on the children if the present placements were disrupted.

30. It is undisputed that the present placements provide the children with a safe and secure environment.

31. Although the placement of these children with their respective foster parents has always been intended to be temporary, the children have become attached to their foster parents. In significant part, this attachment results from the delay in resolving these matters by the courts.

32. While there is no dispute that removing the children from their foster parents will be disruptive, considerable controversy exists over the severity of the impact and whether that impact warrants a refusal to transfer jurisdiction to the Tribal Court. There was also testimony about the steps which might be taken to alleviate the impact on the children if removal were to occur.

33. In addition to the testimony about the impact of removal, considerable evidence was presented about the potential long-term impact of denying the children the ability to participate in the culture of the Cheyenne River Sioux Tribe. Dr. Wandersman, a clinical psychiatrist who evaluated the child for the Department of Social Services and expressed concern about the effect of removal, testified that she agreed with the statement adopted in 1975 by the American Academy of Child Psychiatry:

> There is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well-intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment with its attendant multiple ramifications. Consequently, these problems combines [sic] with their

untoward early childhood preplacement experiences adversely affect their young adulthood and their own potential capacities as parents.

34. This issue is further complicated by the fact that the parental rights have not been terminated and the children could be reunited with their birth mother and father or step father as the case may be.

35. Mr. Bruce Gottlieb, a clinical social worker who testified for the Tribe, stated that he was of the opinion that separating Indian children from their culture had the potential to create serious problems for the children in the long term. Mr. Gottlieb further stated that it was important for these children to develop their identity as an Indian in order for them to develop their identity as an individual. He also stated that there is no substitute for participating in Indian culture and that second hand activities are not a sufficient substitute for being a part of the tribal culture. He noted that each tribe had a different history and background and that while it was beneficial for the children to observe different tribes, it was important for these children in the long term to be involved with the Cheyenne River Sioux Tribe.

36. Mr. Lends His Horse testified that the Tribe had resources available through the Bureau of Indian Affairs and the South Dakota Department of Social Services to provide the children with suitable counseling and therapy to assist in the impact of removal as well as the abuse which they have suffered. The Department of Social Services has not provided the children with any counseling or therapy to date.

37. The Tribal Court is well equipped to deal with the difficult questions which surround the placement of

these children. Mr. Lends His Horse works with the South Dakota Department of Social Services and the Bureau of Indian Affairs in carrying out his duties as the Indian Child Welfare Act Coordinator for the Tribe. Any recommendation Mr. Lends His Horse makes to the Tribal Court relative to these children will be premised upon the advice which he receives from the above-mentioned Departments as well as the existing records and files of the Chester County Department of Social Services.

38. The considerable evidence presented by the Tribe on the importance of raising Indian children in their tribal culture and maintaining their relationship with their tribe is persuasive and not directly rebutted by any of the testimony of witnesses for the guardian ad litem or Department of Social Services. Although there was testimony that the foster parents were aware of the need for the children to maintain contact with their tribal heritage, the testimony that reading and other second hand information is much different than actually being a part of Indian culture which varies from tribe to tribe and which must be learned first hand makes that assertion of little significance.

39. I find that it would be harmful for these children to be separated from their Tribe and that the efforts of the foster parents to teach the children about their heritage is not an adequate substitute for being part of that culture.

40. I also find that the removal of these children from their foster homes will be disruptive and adversely affect the children in the short term. There is no basis to conclude however that removal and placement with the

tribal community will be detrimental to the children in the long term.

41. I find therefore that the impact of removal does not constitute good cause for this Court to refuse to transfer jurisdiction to the Tribal Court. Nor does it contribute to, or otherwise bolster the other factors which may be considered under the Bureau of Indian Affairs Guidelines to justify refusal to transfer jurisdiction to the Tribal Court. To the contrary, these circumstances strongly justify transfer to the Tribal Court which is better equipped to deal with the delicate balancing of these different factors than is this Court.

42. This Court considers the Act's mandate requiring the transfer of jurisdiction to the tribe strong. Likewise, I concur in the general premise and assumption that protection of an Indian child's relation to the tribe is in the child's best long term interest. Thus, I must conclude these particular facts, as above set forth, do not consitute [sic] "good cause to the contrary" as contemplated by Act.

43. I further conclude that due to the extraordinary circumstances of this case, the Guardian ad Litem is entitled to compensation in excess of the sum specified by Rule 51 of the Rules of Practice for Family Courts. While by no means considering this sum adequate, I determine Five Hundred and no/100 ($500.00) Dollars is a minimal amount due the Guardian ad Litem as payment for his services.

IN SUMMARY:

The basic and only issue to be decided in this case is whether or not the jurisdiction to hold further hearings concerning placement, termination of parental rights, and possibly adoption hearings should lie in South Carolina or in South Dakota. It should be remembered that these are Indian children whose welfare should be governed by Indian law. South Carolina, in my opinion, has no business in the case at this point other than the responsibility of housing the children. Decisions about their future should be made in South Dakota. The parental rights of these people, who are now residents of South Dakota, have not even been terminated at this point. All of the blood kin of the children, with the exception of the paternal grandparents in North Carolina, are living in South Dakota. The Indian heritage, to which these children are entitled, is on the Sioux Indian Nation in the State of South Dakota. At this point in time, nothing remains in South Carolina except the children themselves. The fact that the foster parents have given so much to the children and have provided so well for them gives me much concern regarding my ruling and my heart goes out to these fine people who have become so emotionally and lovingly attached. It should be remembered, however, that there still exists a possibility of rehabilitation and reuniting of the children and the parents or at least reuniting all of the children with an Indian family as opposed to the present situation wherein two of the children are placed with Black foster parents and two of the children are placed with White foster parents. The jurisdiction issue in this case should be decided in favor of the Indian Court in South Dakota and not the Family Court

of South Carolina in determining what is best in the future placement and/or adoption of these *original Americans* as mandated by Federal Law.

IT IS ORDERED:

(1). That legal custody of the four minor children, to-wit: (a) Billie Jo Morrison, born January 1, 1978; (b) Tara Morrison, born May 9, 1979; (c) Jacqueline Coleman, born October 26, 1981; and (d) Heather Coleman, born January 31, 1983, is to be transferred from the Chester County Department of Social Services to the Cheyenne River Sioux Indian Tribe provided that such transfer shall not occur prior to sixty (60) days from the date of this order. The Petitioner shall arrange and coordinate such transfer with the Tribal Indian Child Welfare Coordinator, Joe Lends His Horse. The transfer of custody shall take place in Chester County, South Carolina, with the Tribe to assume all responsibility for the protection, welfare, safety and well-being of these children upon the effective date of the transfer.

(2). Prior to the transfer of said custody to the Tribe, the Tribe and Department of Social Services are directed to confer and agree upon a treatment plan for the children relative to the impact of removal whenever the Tribal Court determines to remove the children from their present foster homes. The responsibility for providing services under the plan shall be shared by the Tribe and Department of Social Services.

(3). That the Chester County Department of Social Services pay the sum of Five Hundred and no/100 ($500.00) Dollars to Richard M. Steele for his services as Guardian ad Litem of the minor children.

AND IT IS SO ORDERED.

/s/ Thomas Barrineau, Jr.
Thomas B. Barrineau, Jr.
Family Court Judge
Sixth Judicial Circuit

Winnsboro, South Carolina
April 5th, 1989

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Chester County Department of Social Services,
.....Petitioner-Respondent,

v.

Joe L. Coleman, Phyllis Coleman, and Dorothy Clark, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court,
.....Respondents.

IN RE: Billie Jo Morrison, DOB: 1-1-78, Tara Morrison, DOB: 5-9-79, Jacqueline Coleman, DOB: 10-26-81, Heather Coleman, DOB: 1-31-83, all minor children under the age of Eighteen (18) years,

of whom

Billie Jo Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, by and through their duly appointed Guardian Ad Litem, Richard M. Steele

are .....Appellants.

Appeal From Chester County
Thomas B. Barrineau, Jr., Family Court Judge

Opinion No. 1219
Heard April 13, 1988 – Filed September 26, 1988

REVERSED AND REMANDED

Robert Marshall Jones, of Rock Hill, for appellants.

Claude S. Coleman, of Chester, for petitioner-respondent.

Tee Ferguson, of Spartanburg; Bruce R. Greene and Elizabeth Meyer, both of Boulder, Colorado; and George M. Hearn, Jr., of Conway, for respondents.

PER CURIAM: This appeal arises from a child placement proceeding. It involves the application of the federal Indian Child Welfare Act.[1]

Billie Jo Morrison, Tara Morrison, Jacqueline Coleman, and Heather Coleman are the minor children of Joe and Phyllis Coleman. Phyllis and her daughters are enrolled members of the Cheyenne River Sioux Tribe in South Dakota. Billie Jo and Tara are her daughters by a previous marriage. Jacqueline and Heather are her daughters by Joe Coleman, her present husband. Mr. Coleman is a retired military man. He is a black man, not an Indian.

In November, 1983, the Chester County Department of Social Services commenced an action to remove the children from the Coleman home and transfer their custody to the Department. After a removal hearing, the court found that Billie Jo and Tara had been physically abused, and that Jacqueline and Heather were threatened with substantial harm if allowed to remain in their parents' custody. The court ordered the children to remain in custody of the Department of Social Services. In May, 1984, the Department filed a petition to return the children to their parents. Subsequently, the Department

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[1] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. sections 1901-1963).

amended that petition to allege the children had been physically and sexually abused by the parents. After a hearing, the court found that the children had been sexually abused and ordered them to be placed with the corresponding Department of Social Services in South Dakota. On an appeal from that order, the Supreme Court remanded the case to the family court to determine the proper placement of the children.

The parties to the placement hearing were the Department; the parents; the children, represented by their guardian ad litem, Cindy Hord; Bob and Stella Redwine, the foster parents of the children; and Dorothy Clark, as the Indian Child Welfare Coordinator of the Cheyenne River Sioux, and also as the representative of the Cheyenne River Sioux Tribe. Clark took the position, on behalf of herself and the tribe, that the children's placement is controlled by the Indian Child Welfare Act, which requires the South Carolina court to transfer the case to the jurisdiction of the Cheyenne River Sioux Juvenile Court, sitting in South Dakota. The family court agreed and ordered custody and jurisdiction to be transferred to the tribal court. The children appeal that ruling. We reverse and remand.

When Congress enacted the Indian Child Welfare Act, it had two main goals: (1) protecting the best interests of Indian children, and (2) promoting the stability and security of Indian tribes and families. To achieve these objectives, the Act sets minimum federal standards for child placement proceedings in order to prevent the unwarranted separation of Indian children from family and tribal heritage. The Act is based on the assumption that protection of the Indian child's relationship to the

tribe is in the child's best interest. 25 U.S.C. Section 1902; *A. B. M. v. M. H. & A. H.*, 651 P.2d 1170 (Alaska 1982) *cert. denied sub nom. Hunter v. Maxie*, 461 U.S. 914 (1983); *In re Adoption of K. L. R. F.*, 356 Pa. Super. 555, 515 A.2d 33 (1986) *appeal dismissed*, ___ Pa. ___, 533 A.2d 708 (1987).

Under the Act, if the tribe or either parent of an Indian child petitions for transfer of the proceeding to the tribal court, the state court cannot proceed with the placement of an Indian child living outside a reservation, without first determining whether jurisdiction of the matter should be transferred to the tribe. 25 U.S.C. Section 1911(b). The statute provides:

> In any State court proceeding for the foster care placement of . . . an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon petition of either parent . . . or the Indian child's tribe. . . .

25 U.S.C. Section 1911(b). In other words, transfer to the jurisdiction of the tribe is mandatory in the absence of good cause to the contrary.

The phrase "good cause to the contrary" is not defined in the Act itself. However, the legislative history of the statute states that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. H.R. REP. No. 1386, 95th Cong. 2nd Ses. 21, *reprinted in* 1978 U.S. CODE CONG. &

ADMIN. NEWS 7530, 7544. Federal guidelines interpreting the Act define "good cause to the contrary" as including, but not limited to cases where (1) the proceeding is at an advanced stage when the petition to transfer is received and the petition is not promptly filed after receipt of notice; (2) the Indian child is over the age of twelve and objects to the transfer; (3) evidence necessary to decide the case cannot be adequately presented to the tribal court without undue hardship to witnesses and parties; (4) the parents of an Indian child over the age of five are not available and the child has had little or no contact with the child's tribe or members of the child's tribe. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67583, 67591 (1979) (Not codified). An earlier version of these guidelines also included the case where the Indian child had not resided on the reservation for a significant period of time. *See* Recommended Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 24000, 24001 (1979). Case law also suggests that "good cause to the contrary" includes the absence of a tribal mechanism for handling child custody matters. *In the Matter of the Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (Ct. App. 1981) *cert denied*, 455 U.S. 1007 (1982). The burden of establishing good cause to the contrary is on the party opposing the transfer. 44 Fed. Reg. 67583, 67591 (1979). The third element of the guidelines has been applied to deny transfer due to considerations of *forum non conveniens*, such as availability of witnesses and access to proof. *In the Interest of J. R. H. and M. J. H.*, 358 N.W.2d 311 (Iowa 1984).

In this case, the family court failed to consider the various factors which may constitute "good cause" under the statute. This was error. What little we are able to glean from the record indicates that a biological parent of the two older girls, both of whom are over five years of age, may be unavailable; that none of the children has had any contact with the tribe or has resided on the reservation for a significant period of time; and that the material witnesses and evidence relating to placement are in South Carolina, not South Dakota. These factors, together with evidence that removal of the children would be disruptive and detrimental to their best interests, may well constitute "good cause" for the family court to retain jurisdiction of the case.

Because we are unable to make this factual determination on the record before us, we reverse and remand for a redetermination of the issue. In deciding if "good cause to the contrary" exists or not, the family court should make specific findings on the factors outlined above.

REVERSED AND REMANDED.

/s/ Illegible

/s/ Curtis G. Shaw, J.

/s/ Randall T. Bell, J.

STATE OF SOUTH CAROLINA COUNTY OF CHESTER	)	IN THE FAMILY COURT
Chester County Department of Social Services, Petitioner, vs. Joe L. Coleman, Phyllis Coleman and Dorothy Clark, Indian Child Welfare Coordinator of the Cheyenne River Sioux Juvenile Court, Respondents. IN RE: Billie Jo Morrison, DOB: 1-1-78 Tara Morrison, DOB: 5-9-79 Jacqueline Coleman, DOB: 10-26-81 Heather Coleman, DOB: 1-31-83, all minor children under the age of eighteen (18) years.	)	ORDER Case No. 83-DR-12-400

THIS MATTER came to be heard before me in Chester, S. C., on October 1st, 1986. Present at the hearing was Claude S. Coleman, Assistant Solicitor, on behalf of the Petitioner. The Respondents were present represented by their attorney, Mr. Tee Ferguson. Mr. Lamar H. Kelsey, III was present as attorney for the four minor children; Mrs. Cindy Hord, as Guardian ad Litem for the minor children; Dorothy Clark, as Indian Child Welfare Coordinator and representative of the Cheyenne River Sioux Indian Tribe; and Robert M. Jones on behalf of the foster parents.

The action today is before me by Order of Remand issued by The Supreme Court of South Carolina on April 4th, 1986, for the limited purpose of determining proper foster care placement for the four minor children. Also, before me is a Motion for Randy L. Miller, Esquire to be relieved of his representation of the Respondent, Phyllis Coleman. After consideration of the entire record including all testimony, exhibits, recommendations, memorandums of law, and arguments of counsel, I make the following findings of fact.

FINDINGS OF FACT

That the Respondent, Phyllis Coleman, is agreeable to Mr. Randy L. Miller being relieved as her attorney and being represented by Mr. Tee Ferguson. There is no conflict of interest in Mr. Ferguson representing both Respondents at this stage in the proceedings.

All four children are enrolled members of the Cheyenne River Sioux Indian Tribe. The Tribe has indicated their desire to receive jurisdiction over the children for the purposes of placement in a temporary and/or permanent foster or adoptive home. The Tribal Juvenile Court places its first priority for placement of removed children with relatives, friends, or other tribal members living on the reservation who shall raise the children with due regard to Tribal or family customs.

All evidence presented to this Court indicates the children are in excellent foster homes, have adapted relatively well to their present surroundings, and are being provided the home atmospheres and services needed. Such is necessary to allow them to overcome the abuse

with its accompanying emotional and psychological harm inflicted upon them by the Respondents. In addition, I am aware of the attachment and bonds which have developed between the children and their respective foster parents, and the potential harm to the children by removing them from their present surroundings. However, the record indicates the availability of various social services to children on the Reservation by both state and federal agencies necessary to assist in the treatment of physically and sexually abused children.

The Court must consider the mandate placed upon it by the *Indian Child Welfare Act of 1978,* as set forth in *25 U.S.C.S. Section 1901 et. seq.*. Congress in recognizing the special relationship between the United States and the Indian Tribes and their members, stated that the policy of this Nation is " . . . to promote the stability and security of Indian Tribes and families . . . by placing children removed from their families . . . in foster or adoptive homes which will reflect the unique values of Indian culture." *Section 1902.* Congress has responsibility for the protection and preservation of Indian tribes and their resources and recognized "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *Section 1901 (3).*

Since their initial removal in October, 1983, these children have undergone various foster care placements. Expert testimony presented indicates moving the children again may be harmful and disruptive to them. However, a change in placement is better now than at some later time when the children may be even more attached and bonded to their foster homes. In the long term, it is in the children's best interest to be returned to the Tribe for

placement in an environment which reflects the unique values of their Indian background and hopefully offers the opportunity for lasting and permanent homes.

The issue of transfer of jurisdiction to the Tribal Court first came before the Court on December 4th, 1984. At that time the Court determined in its Order dated December 13th, 1984, there was "good cause for this Court to retain jurisdiction until all allegations of actual and threatened abuse to these children which occurred within this jurisdiction are resolved." Such has now taken place. This Court finds "good cause" no longer exists for this Court to retain jurisdiction for placement proceedings of the four minor children.

I further find the participation of Robert M. Jones, as attorney for one or more of the foster parents of the involved children, was limited to participation at the merit hearing. Although allowed to be present at this hearing, I find it is not appropriate for him to participate or call witnesses.

Also, this Court is aware that in a separate legal action unrelated directly to this one, the Petitioner has commenced a proceeding for the termination of parental rights of the Respondents. This Court does not intend its ruling in the matter before it today to affect the termination action in any way. Therefore,

IT IS ORDERED:

(1). That Randy L. Miller, Esquire be allowed to withdraw from representation of Phyllis Coleman and Tee Ferguson, Esquire be her attorney of record in this matter.

(2). That legal custody of the four minor children, to-wit: (a) Billie Jo Morrison, born January 1, 1978; (b) Tara Morrison, born May 9, 1979; (c) Jacqueline Coleman, born October 26, 1981; and (d) Heather Coleman, born January 31, 1983, is hereby transferred to the Cheyenne River Sioux Indian Tribe effective upon transfer of physical control and custody of the children to a representative of the Tribe. Within twenty (20) days from the filing of this Order the Petitioner shall arrange and coordinate such transfer with the Indian Child Welfare Coordinator, Mrs. Dorothy Clark. The transfer of custody shall take place in Chester County, South Carolina, with the Tribe to assume all responsibility for the protection, welfare, safety and well-being of these children upon receiving physical custody and control.

AND IT IS SO ORDERED.

I verily believe this Order to be in compliance with Rule 27 (c) of the Rules of Practice for the Family Courts.

November 10th, 1986.

/s/ Thomas B. Barrineau
THOMAS B. BARRINEAU
FAMILY COURT JUDGE
SIXTH JUDICIAL CIRCUIT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM CHESTER COUNTY
HONORABLE THOMAS B. BARRINEAU, JUDGE
CASE NO. 83-DR-12-400

Chester County Department of Social Services, Petitioner, – Respondent against Joe L. Coleman and Phyllis Coleman, Respondents. IN RE: Billie Jo Morrison, DOB: 1-1-78 Tara Morrison, DOB: 5-9-79 Jacqueline Coleman, DOB: 10-26-81 Heather Coleman, DOB: 1-31-83, all minor children under the age of eighteen (18) years. Of whom Billie Jo Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, by and through their duly appointed Guardian ad Litem, Cynthia S. Hord are Appellants	ORDER

This matter is before the Court upon the Petition of the Chester County Department of Social Services, Respondent, requesting remand of the issue of foster care placement of the four minor children to the trial court. Upon reading the Petition and on motion of Assistant Solicitor Claude S. Coleman, Attorney for the Petitioner-

Respondent and with the consent of Lamar H. Kelsey, III, attorney for the Appellants,

IT IS THE ORDER OF THE COURT that the issue of placement of the minor children provided for in paragraph three of the Order of the Honorable Thomas B. Barrineau dated February 28, 1986, be remanded to the Family Court of the Sixth Judicial Circuit for the Petitioner to show cause why placement as therein ordered is not appropriate or in the children's best interest.

Columbia, South Carolina
April 4, 1986.

J. B. NESS, CHIEF JUSTICE
For the Court
By /s/ Clyde N. Davis, Jr.
Clerk

I MOVE:

/s/ Claude S. Coleman
Assistant Solicitor, Claude S. Coleman for the Respondent.

I CONSENT:

/s/ Lamar H. Kelsey, III
Lamar H. Kelsey, III, for the Appellants.

STATE OF SOUTH CAROLINA	)	IN THE
	)	FAMILY
COUNTY OF CHESTER	)	COURT
Chester County Department of Social Services,	)	
Petitioner,	)	
vs.	)	
Joe L. Coleman and Phyllis Coleman,	)	ORDER
Respondents.	)	
IN RE:	)	
Billie Jo Morrison, DOB: 1-1-78	)	
Tara Morrison, DOB: 5-9-79	)	
Jacqueline Coleman, DOB: 10-26-81	)	
Heather Coleman, DOB: 1-31-83,	)	
all minor children under the age of eighteen (18) years.	)	

THIS MATTER came to be heard before me in Chester County, S. C., on February 13th, 1986. Present at the hearing was Claude S. Coleman, Assistant Solicitor, on behalf of the Petitioner, the Respondent, Phyllis Coleman, with her attorney, Randy L. Miller, the Respondent, Joe L. Coleman, with his attorney, Tee Ferguson, the Guardian ad Litem for the four (4) minor children, Cynthia S. Hord, Lamar H. Kelsey, III, attorney for the minor children, and Robert M. Jones, attorney for the foster parents.

The Petitioner first initiated action involving the Respondents by its Order, Rule to Show Cause, Notice and verified Petition on November 9, 1983, whereby under Ex Parte Order emergency custody of the four (4)

minor children was granted to Petitioner due to an imminent risk of harm for the physical well-being of the children. After following proper judicial procedures, a merit hearing was held before this Court on December 22, 1983, with all parties properly represented. At that hearing a judicial determination was made that Billie Jo Morrison and Tara Morrison were physically abused children and that Jacqueline Coleman and Heather Coleman were threatened with substantial harm if allowed to remain in custody of the Respondents. All four (4) children were ordered to remain in custody of the South Carolina Department of Social Services for their protection and welfare. Thereafter, a judicial review hearing was scheduled for June 4, 1984, wherein the Petitioner proposed to maintain custody of all children and place the two younger children in the home with the Respondents under supervision of the Petitioner. Prior to said hearing the Petitioner received allegations of additional abuse and threat of harm endangering the minor children. The Petitioner was granted a continuance for further investigation of abuse and threat of harm to the children. As a result of further investigation of Petitioner and law enforcement authorities, the Respondents were arrested and indicted for various criminal charges involving sexual abuse of the two older children. The Respondents moved under the *Indian Child Welfare Act of 1978*, as amended, to transfer jurisdiction of all proceedings involving the custody of the minor children to the Cheyenne River Sioux Tribal Juvenile Court. This Motion was denied and jurisdiction retained in this Court by Order of the Honorable Berry L. Mobley, Family Court Judge of the Sixth Judicial Circuit, dated December 13, 1984. As set

forth in this Order jurisdiction was retained in the State Court as provided for under the provision of the Federal Act. Thereafter, Petitioner filed an amended Petition on September 19, 1985, alleging sexual abuse of the children by the Respondents and that such abuse creates a continuāl threat of harm to the children if placed with the Respondents. The merit hearing on these allegations was initially scheduled for October 2nd, 1985, but continued on Motion of the Respondents as set forth in my Order dated October 14, 1985. The Respondents have answered and all written motions have been disposed of in the prior rulings of this Court. Prior to commencing the testimony, Mr. Ferguson orally moved to transfer venue to the U. S. District Court. The motion is denied at this time, but Respondent's right to do so in the future if allowed by Federal law is reserved to them. Respondent's motion to sequester witnesses was granted. After careful consideration of the entire record including all evidence before the Court, I find as follows:

FINDINGS OF FACT

This Court has jurisdiction of the subject matter and all parties to the action. The parties and issues are properly before the Court.

There was extensive testimony in this case of which a substantial portion came from medical experts. The four minor children were removed from the home of the Respondents on November 9th of 1983 at which time their ages were: Billie Joe-five years, ten months; Tara-four years, six months; Jacqueline-two years, one month; and Heather-eleven months. The removal was due to a

judicial finding of severe physical abuse by the Respondents of the two older children and a threat of harm to the two younger children. Shortly after the initial removal, the two older children were placed with foster parents and the younger children in a different foster home. At no time have the children been in the same foster home. The only unsupervised visitation of the children with the Respondents was an overnight visit during Christmas, 1983. The respective foster homes are approved and licensed by the State of South Carolina.

After the initial indication of sexual abuse of Billie Jo, she and Tara were examined by a medical doctor in Rock Hill. This Dr. testified as an expert witness in the field of Family Practice and was called by the Respondents. Her pelvic examination of both children revealed physical findings and injury consistent with vaginal penetration and sexual abuse.

The other expert, Dr. Sara E. Schuh, is Director of the Child Abuse Center and Professor of Pediatrics at the Medical University of South Carolina, and testified as an expert in the field of Pediatrics with extensive experience in the field of child sexual abuse. Billie Jo and Tara were examined by Dr. Schuh on November 26th, 1984, with the younger children being examined approximately two weeks later. In all four children were found physical evidence of vaginal penetration by foreign objects. There were healed lacerations of the hymen. The scars were well healed which indicated an injury of more than eight weeks. There was hyper-pigmentation in the genital area which is a symptom of irritation consistent with digital and partial penetration of the vagina. The physical injuries to the three older children were consistent with the

medical history given the Doctor by the three older girls. In their medical history, Billie Jo, Tara and Jacqueline told in explicit details of having been sexually abused by the Respondents. At the time of her examination, Heather was non verbal but Dr. Schuh's physical findings indicate she likewise had been sexually abused.

The children related the details in such description that they could not have been programmed to give such information. It is not unusual for sexually abused children of this age to delay for a period of six months or more before telling of the abuse. It is necessary for them to develop trust in someone after leaving such an atmosphere before disclosing the abuse. Likewise, children of this age may even indicate a desire to return to such a home situation until they can develop a home atmosphere somewhere else. Abuse victims, in spite of all, usually care about their parents and do not want to see them get in trouble.

The nature of the children's injuries indicate that it is unlikely they were caused by a single sexual episode. It indicates multiple occasions or an on-going situation.

Dr. Schuh testified over the past several years she has examined over one thousand children who were the victims of abuse. She was unaware of any case where a child imagined such events of abuse in order to live in a different environment.

Here, we have three children, who relate in graphic and explicit detail a medical history of physical and sexual abuse by the Respondents. A highly qualified medical expert finds evidence of previous physical injury to these

children consistent with their stories and likewise indicative of severe sexual abuse. In addition, the older children related by word and demonstration with anatomically correct dolls details of their abuse to the Social worker and Guardian ad Litem.

I find the evidence of all four children having been sexually abused by both Respondents to be overwhelming. The evidence is clear and convincing that these children cannot be protected from further sexual abuse if in custody of the Respondents. A return of custody of these children to the Respondents will assuredly result in serious emotional and physical injury to the children.

In the event the Respondents attend and comply with all counseling, testing and therapy sessions recommended to them, the Petitioner shall schedule and arrange for periods of closely supervised visitation with the children.

This record indicates that all four minor children are enrolled members of the Cheyenne River Sioux Indian tribe located in South Dakota. This Court recognizes the stated policy of the Congress of the United States as established by the *Indian Child Welfare Act of 1978* to promote the welfare and stability of Indian tribes and families. Further, it is policy under the Act that the placement of Indian children be in foster or adoptive homes which will reflect the unique values of Indian culture.

The Guardian ad Litem and Attorney for the children served in their respective capacities by appointment of this Court. Each has expended significant time and effort in their duties and is entitled to be compensated for their efforts. Since this action was commenced, each has spent

substantial time in Court proceedings as well as preparation for same.

Therefore,

IT IS ORDERED:

(1). That care, custody and control of the minor children, to-wit: Billie Jo Morrison, Tara Morrison, Jacqueline Coleman and Heather Coleman, continue with the Petitioner or other proper authority due to the danger of further abuse if returned to custody of the Respondents.

(2). That visitation privileges of the Respondents with the minor children are continued under close supervision of the Petitioner. The Respondents shall attend and complete such testing, counseling, therapy and treatment as directed by the Petitioner necessary to evaluate if the Respondents can resume custody in the future. All testing will be done at expense of the Respondents.

(3). The Petitioner shall transfer the minor children along with copies of all files and records of these proceedings to an appropriate corresponding agency in a state near the tribal lands of the minor children for placement according to the policies established by the *Indian Child Welfare Act of 1978*, as amended. PROVIDED, that if the Petitioner believes such placement is not in the children's best interest or appropriate under said Act, it may initiate proceedings in this Court within thirty days from the filing of this Order to show cause why the children should not be placed as above set forth.

(4). That the South Carolina Department of Social Services pay Cynthia S. Hord, 111 Dogwood Lane,

Chester, S. C., the sum of One Hundred Fifty and No/100 ($150.00) Dollars for her services as Guardian ad Litem and pay Lamar H. Kelsey, III, Attorney at Law, P. O. Box 433, Chester, S. C., the sum of Two Hundred Fifty and No/100 ($250.00) Dollars for his representation as attorney for the children.

AND IT IS SO ORDERED.

I verily believe this order to be in compliance with Rule 27 (c) of the Rules of Practice for the Family Courts.

s/ _____
THOMAS B. BARRINEAU
FAMILY COURT JUDGE
SIXTH JUDICIAL CIRCUIT

February 28, 1986.
Winnsboro, South Carolina

(2)

No. 90-1493

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1990

INDIAN CHILD WELFARE COORDINATOR OF THE JUVENILE COURT OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL.,

Petitioners,

v.

CHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES CONSTITUTION
AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who have previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE INDIAN CHILD WELFARE ACT

25 U.S.C. § 1901 *Congressional findings*

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds –

> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902 ***Congressional declaration of policy***

The congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian

tribes in the operation of child and family service programs.

25 U.S.C. § 1903 *Definitions*

For the purpose of this chapter, except as may be specifically provided otherwise, the term –

> (1) "child custody proceeding" shall mean and include –
>
> > (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
> >
> > (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
> >
> > (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
> >
> > (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step parent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the

services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911 *Indian tribe jurisdiction over Indian child custody proceedings*

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an

Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe

shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1912 *Pending court proceedings*

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1913 ***Parental rights, voluntary termination***

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.

The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court

shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1914 ***Petition to court of competent jurisdiction to invalidate action upon showing of certain violations***

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1915 ***Placement of Indian children***

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting

which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with –

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

25 U.S.C. § 1916 *Return of custody*

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 U.S.C. § 1917 ***Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court***

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

INTER-DISTRICT TRANSFER OF CASES

28 U.S.C. § 1404 *Change of Venue*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

(3)

No.90-1493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

INDIAN CHILD WELFARE COORDINATOR OF THE JUVENILE COURT OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL.

Petitioners,

-vs-

CHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S, GUARDIAN AD LITEM, BRIEF IN OPPOSITION

Robert Marshall Jones
Counsel of Record
P. O. Box 706
Rock Hill, SC 29731
(803) 329-2988

Counsel for Respondent,
Guardian Ad Litem for
the minor children.

QUESTIONS PRESENTED

Respondent refers to the Petition for Questions One through Four.

ADDITIONAL QUESTIONS

5. Whether the Petitioner's for Writ of Certiorari fails to comply with United States Supreme Court Rule 14 (h)?

6. Whether the Petitioner's Petition for Writ of Certiorari fails to meet the requirements of 28 U.S.C. § 1257 (a)?

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No.90-1493

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

INDIAN CHILD WELFARE COORDINATOR OF
THE JUVENILE COURT OF THE CHEYENNE
RIVER SIOUX TRIBE, ET AL.
Petitioners,

-vs-

CHESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES, ET AL.
Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA**

**RESPONDENT'S, GUARDIAN AD LITEM,
BRIEF IN OPPOSITION**

JURISDICTION

The judgment of the South Carolina Supreme Court denying transfer of jurisdiction of this case to the Petitioner was entered December 10,1990. The Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (a). The Respondent

submits that the Petitioner has failed to present to the Court below the questions stated in its Petition for Writ of Certiorari.

RESPONDENT'S COUNTERSTATEMENT

OF THE CASE

This action involves the fate of four physically and sexually abused young girls, BJM, TM, JC and HC (TR-299). Phyllis Coleman is the mother of all four of the girls. Audie Morrison is the father of BJM and TM (TR-35). Joe Coleman is the father of JC and HC(TR-34). BJM was born January 1, 1978. TM was born May 9, 1979. Phyllis Coleman divorced Audie Morrison in 1981 (TR-42). She moved to Rapid City, South Dakota in 1979 and became involved with Joe Coleman (TR-34). JC was born in Rapid City on October 10, 1981. HC was born in Rapid City on January 31, 1983. Phyllis and Joe were married in March, 1983.

BJM and TM have been in foster placement twice in Rapid City, South Dakota. The first time was in August, 1980, when Mrs. Coleman had left BJM with a friend who had neglected her (TR-34). The second time was in August, 1981, when Mr. Coleman placed

the children when he had to return to military duty and did not know where Mrs. Coleman was.

In 1983, Mr. Coleman left the military and in August,1983, brought the family to North Carolina, where most of his family were located (TR-35). In September, 1983, Mr. Coleman purchased land and a mobile home in the Fort Lawn community of Chester County, South Carolina. Joe and Phyllis Coleman planned to make this their permanent residence and were in the process of building a home on the property (TR-35).

On November 9, 1983, the Department of Social Services initiated an action in the Family Court removing the four minor children from the home of the Colemans (TR-295). On December 22, 1983, the Family Court determined that BJM and TM had been physically abused; that JC and HC were threatened with substantial harm if allowed to remain in the custody of the Colemans and that custody should be transferred to the Department of Social Services (TR-295). This finding has never been appealed by the Colemans.

During this time the Department entered into a program of counseling the Colemans with the aim of reuniting the family (TR-28). On January 10, 1984, the Department

advised the Petitioner the four Indian children were in its custody (TR-309). By letter dated January 26, 1984, the Petitioner advised it would seek transfer only if requested by the parents (TR-308). In May, 1984, the Department was preparing to return the children to the Colemans when allegations of sexual abuse by the Colemans surfaced (TR-59). By letter dated June 4, 1984, the Petitioner authorized a Mr. David Bald Eagle to go to Chester County, South Carolina and get the children (TR-307). On July 10, 1984, the Family Court declined a Motion by the Colemans to transfer jurisdiction (TR-269). This decision was not appealed by the Colemans or the Petitioner.

In April, 1985, the Colemans were tried in the State Court for criminal sexual conduct on BJM and TM. A mistrial resulted due to a hung jury (TR-270). Although the Petitioner alleges the jury voted 11 to 1, no record is made of how the jurors voted in a mistrial in South Carolina Criminal Courts.

On February 13, 1986, the Family Court held a civil trial on the allegations of sexual abuse and placement (TR-294). The trial court found that all four children had been sexually abused on multiple occasions and that jurisdiction be transferred to the

State agency in South Dakota (TR-299). The Colemans did not appeal the finding of sexual abuse.

The Guardian Ad Litem did appeal the transfer of jurisdiction (Pet. App.11) . On March 26, 1986, the South Carolina Department of Social Services was notified by the South Dakota Department of Social Service that it could not accept transfer of the children (Pet. App. 11). On April 4, 1986, the South Carolina Supreme Court remanded the case on the issue of placement (TR-292).

On October 1, 1986, the Family Court held a hearing on the remand. Among other things it ordered a transfer of legal custody and of physical custody to the Petitioner (TR-287). The Guardian Ad Litem appealed this decision of the Family Court (TR-284). Pending the appeal the Guardian Ad Litem and her attorney moved to be relieved. The South Carolina Supreme Court appointed the present Guardian Ad Litem and the present attorney (TR-271). On September 26, 1988, the South Carolina Court of Appeals reversed and remanded the case to the Family Court to make specific findings on whether or not "good cause to the contrary" existed to transfer jurisdiction. (Pet. App. 25) and reported at 296 S.C. 355, 372 S.E. 2d 912 (Ct. App. 1988). The Petitioner did not

seek rehearing by the Court of Appeals nor certiorari to the South Carolina Supreme Court.

After another hearing the Family Court issued its Order dated April 5, 1989, transferring jurisdiction to the Petitioner (Pet. App. 9). The Guardian Ad Litem appealed this Order. On December 10, 1990, the South Carolina Supreme Court issued its Order denying transfer of the case to the Petitioner (Pet. App. 1). The Petitioner did not file a timely Petition for Rehearing in this matter with the South Carolina Supreme Court,(Res. App. 3).

Although the Petitioner alleges at page 7 of its Petition that the Guardian "eschewed" certain arguments, it is apparent from the record below that the Guardian took nine Exceptions to the Family Court's Order and briefed each one (TR-349),

There is still pending in the South Carolina Family Court an action for termination of parental rights; which if granted would require further action for permanent placement (TR-60).

REASONS WHY THE PETITION

SHOULD BE DENIED

1. THE PETITION FOR WRIT OF CERTIORARI FAILS TO COMPLY WITH RULE 14 (h) OF THE UNITED STATES SUPREME COURT RULES, 1990.

Under 28 U.S.C. § 1257 (a), this Court has held that a federal question must have been raised, presented and pursued in a proper and timely manner at the appropriate points in the state court proceedings for the Court to have jurisdiction. Crowell v. Randell, 10 Pet. 368, 391 (1836); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434 (1940); Hill v. California, 401 U.S. 797, 805 (1971).

United States Supreme Court Rule 14 (h) states that the Petitioner seeking review of a state court decision must specify in the statement of the case "the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; ***".

This Court has stated many times that when the highest state court has failed to pass upon a federal question, it will be

assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. Street v. New York, 394 U.S. 576, 582 (1969); Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n. 3 (1983).

The Petitioner failed to properly and timely raise the questions presented here in the state courts below. Even after the South Carolina Supreme Court decision of December 10, 1990, the Petitioner could have presented the questions it now presents, to the state Supreme Court by a Petition for Rehearing. Petitioner failed to timely do so.

2. THE SOUTH CAROLINA SUPREME COURT HAS FOLLOWED THE MANDATE OF THE INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1901, ET SEQ.

The South Carolina Supreme Court, in its opinion, discusses the history and purposes of the ICWA. It discusses 25 U.S.C. § 1911(b) (1978) of the act. It discusses the term "good cause to the contrary". It quotes from the legislative history of the Act that the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a child custody proceeding involving an Indian child. S. Rep. No. 597,

95th. Cong., 1st Sess. 17 (1977), reprinted in 1978 U. S. Code Cong. & Admin. News 7530. It discusses the Guidelines for State Courts; Indian Child Custody proceedings 44 Fed. Reg. 67584 (1979) published by the Bureau of Indian Affairs. It cites BIA Guideline (b) (iii) (1979) which approves the modified doctrine of form non conveniens. The BIA Guidelines acknowledge that "application of this certiorari will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. at 67591.

The Court then discusses a number of cases from other states dealing with "geographical obstacles". In the Interest of J.R.H., 358 N.W. 2d 311, (Iowa 1984); Matter of Wayne R.N., 107 N. M. 341, 757 P. 2d 1333 (N.M. App. 1988); The Matter of N. L., 754 P. 2d 863 (Okl. 1988); In re Robert T., 200 Cal. App. 3rd 657, 246 Cal. Rptr. 168 (1988); People in Interest of J.J., 454 N. W. 2d 317 (S.D. 1990).

It is clear from its opinion that the South Carolina Supreme Court has made diligent and proper efforts to follow the mandate of the ICWA.

3. THE SOUTH CAROLINA SUPREME COURT HAS FOLLOWED THE TEACHINGS OF THIS COURT IN THE

HOLYFIELD CASE.

In Mississippi Band of Choctaws v. Holyfield,303 U.S.2021, 109 S. Ct. 1597, (1989), this Court stated that the sole issue before the Court was whether the children were "domiciled" on the reservation for purposes of 25 U.S.C. § 1911(a) [the exclusive tribal jurisdiction section of the ICWA].

Not even the Petitioner has disputed that this case comes under 25 U.S.C. § 1911 (b) which provides as follows:

> "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe."

"Good cause" is not defined in the Act itself. However, the legislative history states that the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a child custody proceeding involving an Indian child. S.Rep. No. 597, 95th Cong., 1st Sess. 17 (1977), reprinted in 1978 U.S.

Code Cong. & Admin. News 7530. The Bureau of Indian Affairs (BIA) published non-binding guidelines to aid states courts in interpreting the Act. (BIA Guidelines) See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (1979). The BIA Guidelines list several factors which may constitute "good cause" to deny transfer of jurisdiction to a tribal court. 44 Fed Reg. at 67591. One factor which may constitute "good cause" to deny transfer of jurisdiction under the BIA Guidelines is where the case "could not be adequately presented to the tribal court without undue hardship to the parties and the witnesses." 44 Fed. Reg. at 67591, BIA Guideline (b)(iii) (1979). The commentary to this BIA Guidelines points out that:

> "Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the 1911 (b), " the subsection is intended to permit a State court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian

> parents or custodian, and the tribe are fully protected."

44 Fed. Reg. at 67591.

The doctrine of forum non conveniens is modified in the Indian child custody context so as to allow state courts to determine whether the tribal court is a less convenient forum. The BIA Guidelines acknowledge that "application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. at 67591.

It is clear that the South Carolina Supreme Court is following the Congressional Mandate under the I.C.W.A.

4. THE SOUTH CAROLINA SUPREME COURT DID NOT DENY THE INDIAN PARTIES DUE PROCESS OF LAW BY MAKING FINDINGS OF FACTS IN ACCORDANCE WITH ITS OWN VIEW OF THE PREPONDERANCE OF THE EVIDENCE.

(A) THE PETITIONER HAS NOT RAISE THIS ISSUE IN THE COURTS BELOW.

It is clear from the record below that the Petitioner has never raised the due process issue either in the trial court or appellate courts below. This Court has

repeatedly held that a federal question must be properly framed, raised, presented and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. Godchaux Co. v. Estopina, 251 U.S. 179, 181 (1919); Beck v. Washington, 369 U.S. 541, 550-54 (1962).

(B) THE CASES CITED BY PETITIONER DO NOT APPLY TO APPELLATE COURT JURISDICTION.

The Petitioner cites this Court's holding in United States v. Reddatz, 447 U.S. 667, 677 (1979), upholding the authority of the District Court to make a "de novo determination" without having a "de novo hearing".

In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the issue was the right to appointed counsel in every parental status termination. In Matthews v. Elderidge, 424 U.S. 319 (1976), the issue was whether due process required an evidentiary hearing before termination of Social Security disability benefits. In Morgan v. United States, 298 U.S. 468 (1935), the issue was the due process requirements of administrative procedures before the Department of Agriculture.

The South Carolina Supreme Court has

repeatedly stated that the appellate courts of the state have the jurisdiction and duty not only to correct errors of law but also to find facts in accordance with its own view of the preponderance of the evidence when the case is tried before a judge. Bates v. Bates, 213 S.C. 26, 48 S.E. 2d 612 (1948); Miller v. Miller, 299 S.C. 307, 384 S.E. 2d 715 (1989).

In this particular case the South Carolina Supreme Court had before it a Transcript of Record of the proceeding below containing three hundred fifty-five pages of testimony and exhibits.

5.THE SOUTH CAROLINA SUPREME COURT DID NOT DISREGARD THE PREFERENCE FOR TRIBAL JURISDICTION AND DID NOT CREATE A DE FACTO PREFERENCE FOR STATE COURT JURISDICTION.

The South Carolina Supreme Court went to great lengths to discuss the history of the ICWA. It limited its decision to the narrow issue of the application of the doctrine of forum non convenience as defined in the BIA Guidelines. It reviewed the decisions of other state courts in applying this guideline. In the Interest of J.R.H., 358 N.W. 2d 311, (Iowa 1984); Matter of Wayne R.N., 107 N. M. 341, 757 P. 2d 1333 (N.M. App. 1988); The Matter of N. L., 754 P. 2d 863 (Okl. 1988); In re Robert T., 200

Cal. App. 3rd 657, 246 Cal. Rptr. 168 (1988); People in Interest of J.J., 454 N. W. 2d 317 (S.D. 1990). It did not discuss other reasons which might constitute "good cause".

The Petitioner refuses to recognizes the facts: (1)that these children are several thousands of miles from their reservation, (2) that the children have had little or no contact with the reservation during their young lives, (3) that the South Carolina Court or the tribal Court still must decide the issues of termination of parental rights and permanent placement of the children, and (4) that the witnesses as to the physical and sexual abuse of the children, their care and treatment for the past eight years are all in South Carolina.

It seems clear the Petitioner is requesting this Court to substitute the Petitioner's interpretation of the facts with those found to be true in the state court. This Court should not grant certiorari to review findings of facts. While the question of facts are important to the individual litigants, they do not rise to the level of importance that would justify review. United States Supreme Court Rule 10.

6. THE SOUTH CAROLINA SUPREME COURT DID NOT

REFUSE TO CONSIDER THE RIGHTS OF THE INDIAN CHILDREN AS INDIANS, INDIAN PARENT AND THE INDIAN TRIBE.

(A) THE STATE AGENCY MADE AN ACTIVE EFFORT TO PREVENT THE BREAKUP OF THE HOME AS REQUIRED BY 25 U.S.C. § 1912 (d).

Shortly after these children were taken into protective custody, a treatment plan was started to reunite the children with their parents (TR-28). The agency was taking steps to re-unite the family when the allegations of sexual abuse surfaced (TR-59). It was only after the Court's findings of sexual abuse that the efforts stopped (TR-28). These efforts were made under both the mandates of state law and 25 U.S.C. 1912 (d). The efforts failed due to the inability to rehabilitate the parents (TR-32). The Colemans have never appealed the findings of physical and sexual abuse nor the efforts to reunite the family. The Colemans were represented by retained counsel during all the proceedings except for the last oral arguments before the South Carolina Supreme Court.

(B) THE STATE AGENCY MADE A GOOD FAITH EFFORT TO COMPLY WITH 25 U.S.C. § 1915 (b) IN MAKING ITS FOSTER CASE PLACEMENTS.

25 U.S.C. § 1915 (b) establishes certain requirements for foster care placement which shall be followed. They are as follows:

(1) A setting which most approximates a family.

(2) Within a reasonable proximity of her home.

The Act then sets up preferences which shall be followed in the absence of good cause to the contrary. They are as follows:

(1) A member of the Indian child's extended family.

(2) A foster home approved by the Indian child's tribe.

(3) An Indian foster home approved by a non-Indian agency.

(4) An institution for children approved by an Indian tribe.

When these four children were taken into protective custody, they were residing with the Colemans in Chester County, South Carolina, several thousand miles from their South Dakota reservation (TR-32). The agency started a treatment plan with the Colemans (TR-28). The agency was unable to locate any Indian foster parents nor are there any recognized Indian tribes in South Carolina (TR-45). The agency tried newspaper recruitment for emergency foster

care (TR-45). The Petitioner refused to get involved (TR-308) until the children had been in foster care for nearly eight months (TR-307).

(C) THE QUESTIONS OF THE APPLICATION OF 25 U.S.C. § 1912 (d), 25 U.S.C. § 1915 (a) AND 25 U.S.C. §1915 (d) HAVE NOT BEEN PRESENTED TO THE COURTS BELOW.

25 U.S.C. § 1912 (d) requires that efforts be made to prevent the breakup of the family. The record below indicates that the Petitioner has not raised the issue of any alleged failure by the South Carolina Department of Social Services to comply with the requirements of 25 U.S.C. § 1912 (d) in the state courts below.

25 U.S.C. § 1915 (a) lists the preferences for adoptive placements of Indian children. 25 U.S.C. § 1915 (d) establishes the social and cultural standards applicable.

This case has not reached the point of terminating parental rights which would be required before adoptive placement is considered (TR-40-41). These are the stages of the proceedings which would be governed by 25 U.S.C. § 1915 (a) and (d) when they are reached.

7. THERE ARE OTHER GROUNDS WHICH CONSTITUTE "GOOD CAUSE" NOT TO TRANSFER THE CASE TO THE TRIBAL COURT UNDER THE B.I.A. GUIDELINES.

In order to assist state courts in applying the Indian Child Welfare Act, the Bureau of Indian Affairs published Guidelines for State Courts; Indian Child Custody Proceeding, 44 Fed. Reg. 67584 (1979). It contains the following list of grounds at 44 Fed. Reg. 67591:

> "C3. Determination of Good Cause to the Contrary
>
> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
>
> (i) The proceeding was at an advanced state when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (ii) The Indian child is over twelve years of age and objects to

the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer."

The age of the child is an important factor under the BIA Guidelines. The BIA Guidelines recognize that a child over five years of age who has had little or no contact with her tribes may suffer shock from the change of cultures a transfer may bring. Most children under five years of age can be expected to adjust more readily to a change in cultural environment. These

factors are recognized under C.3 (b) (iv) at 44 Fed. Reg. 67591.

Another "age factor" involves teenagers. The BIA Guidelines recognize that the objection of an Indian child over twelve years of age is an important criteria. In the Commentary to the BIA Guidelines, it is stated "It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives." 44 Fed. Reg. 67591.

BJM (born January 1, 1978) is now thirteen years old and has expressed to her Guardian Ad Litem her objection to being transferred to the reservation, (Res. App. 1). TM (born May 9, 1978) will be twelve years old in May, 1991, and has objected to being transferred to the reservation, (Res. App. 1). The Respondent concedes that this issue was not presented to the courts below, however, the rights conferred under the BIA Guidelines have accrued to these two children during the pendency of this action.

Although the South Carolina Supreme Court only ruled on one exception made by the Guardian Ad Litem, other exceptions were based on the BIA Guidelines. The other

exceptions (found at TR-349-350) were as follows:

" I

The Lower Court erred in its Order of April 5, 1989, in ordering the transfer of the minor children to South Dakota. The error being that all of the evidence was that such a transfer would be detrimental to the best interest of the minor children

II

The Lower Court erred in its application of the Indian Child Welfare Act. The error being its failure to properly apply "the good cause to the contrary" provisions of Chapter 25, § 1911 (b), and § 1915 U.S.C.A. to this particular case.

III

The Lower Court erred in its application of the Indian Child Welfare Act, 25 U.S.C., § 1902. The error being that a Court is required to do what is in the best interest of the Indian child.

IV

The Lower Court erred in refusing to follow the Order of Remand from the Court of Appeals. The error being the failure of the Lower

Court to make specific findings as stated in the Order of Remand which conform to the evidence in the case.

V

The Lower Court erred in finding that the proceedings were not in an advanced stage when the Petition for transfer was received. The error being such a finding was not supported by the evidence.

VI

The Lower Court erred in finding that the evidence necessary to decide the case can be adequately presented to the tribal court without undue hardship to the witnesses. The error being such a finding was not supported by the evidence.

VII

The Lower Court erred in finding that the Indian children had sufficient contact with the tribe or members of the tribe. The error being such a finding was not supported by the evidence.

VIII

The Lower Court erred in finding that the Indian children had lived for a significant period of time on the reservation and the

availability of a biological parent of two of the children. The error being that such a finding was not supported by the evidence.

IX

The Lower Court erred in finding that the removal of the children would not be disruptive and detrimental to their best interest. The error being that such a finding was not supported by the evidence."

8.THIS CASE DOES NOT MEET THE REQUIREMENTS OF UNITED STATES SUPREME COURT RULE 10.

Although the Petitioner seeks to create a conflict between the South Carolina Supreme Court's decision and the Montana Court's decision in Matter of M. E. M., 635 P. 2d 1313 (1981), the Montana Court was reviewing a termination of parental rights case under 25 U.S.C. § 1912 (f), which requires "evidence beyond a reasonable doubt" before termination of parental rights. This case has not reached that point.

It seems clear the Petitioner is requesting this Court to substitute the Petitioner's interpretation of the facts with those found to be true in the state

court. This Court should not grant certiorari to review findings of facts. While the question of facts are important to the individual litigants, they do not rise to the level of importance that would justify review. United States Supreme Court Rule 10.

CONCLUSION

The South Carolina Supreme Court carefully and properly considered and applied the Congressional Mandate of the Indian Child Welfare Act and the published BIA Guidelines for implementation of the ICWA. The South Carolina Supreme Court considered the decisions of other State Courts in applying the ICWA.

The Petition now raises questions before this Court which have not been presented to the Courts below, thus the Petition does not meet the jurisdictional requirements of 28 U.S.C. § 1257 (a). The Petition does not conform to United States Supreme Court Rule 14 (h). The Petition does not present issues which meet the standards for review stated in United States Supreme Court Rule 10.

For the reasons stated above, the Petition should be denied.

Dated: April 8, 1991

Respectfully submitted

Robert Marshall Jones
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No.90-1493

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

INDIAN CHILD WELFARE COORDINATOR OF
THE JUVENILE COURT OF THE CHEYENNE
RIVER SIOUX TRIBE, ET AL.
Petitioners,

-vs-

CHESTER COUNTY DEPARTMENT
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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

APPENDIX TO
RESPONDENT'S, GUARDIAN AD LITEM,
BRIEF IN OPPOSITION

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF YORK)

I, Richard M. Steele, attorney at law, having been first duly sworn do affirm as follows:

1. That I am the Court appointed Guardian Ad Litem for two minor children, BJM and TM.

2. That I have been informed that BJM was born on January 1, 1978, and that TM was born on May 9, 1979.

3. That on March 28, 1991, I met privately with each of the girls, first together, then individually.

4. That BJM told me she did not want to go to the Cheyenne River Sioux Reservation in South Dakota; that she wanted to stay in South Carolina; and that she is now thirteen (13) years of age.

5. That TM told me she did not want to go to the Cheyenne River Sioux Reservation in South Dakota; that she wanted to stay in South Carolina, and that she will be twelve (12) years old on May 9, 1991.

6. It is my opinion that the decision of BJM and TM were made freely and voluntarily.

WITNESS my hand and seal this 28th. of March, 1991, at Rock Hill, South Carolina.

/S/ Richard M. Steele
Richard M. Steele
Guardian Ad Litem
For BJM and TM

Sworn to before me this
28th. day of March, 1991.

/S/Colleen Moon
Notary Public for South Carolina
My Commission Expires: 10-4-1999

[COPY OF LETTER OF SOUTH CAROLINA SUPREME COURT DATED MARCH 6, 1991]

George M. Hearn, Jr., Esquire
1323 Third Street
Conway, S.C. 29526

Scott B. McElroy, Esquire
1007 Pearl Street, Suite 240
Boulder, Colorado 80302

Re: Chester County Department of Social Services v. Joe L. Coleman, et al.

Gentlemen:

This is to advise that the following Order has been endorsed on your Motion for Leave to File Petition for Rehearing Out of Time in the above entitled matter:

"Motion for Leave to File Petition for Rehearing Out of Time is denied.

s/David W. Harwell A.C.J.
For the Court

Chief Justice George T. Gregory,Jr.,not participating

March 6, 1991."

By copy of this letter we are advising all counsel of record of the action of the Court in this matter.

Sincerely yours,
s/Brenda F. Shealy
DEPUTY CLERK

BFS/dmh

cc: Joe L. and Phyllis Coleman
Robert Marshall Jones, Esquire
Claude S. Coleman, Esquire

STATUTES CITED

25 U.S.C. § 1901 - Congressional findings

Recognizing the special relationship between the United States and the Indian Tribes and their members and the Federal responsibility to Indian people, the Congress finds --

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority. Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and

private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902 -Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1911 -Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction -
An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings: declination by tribal court -

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1912 -Pending court proceedings

(d) Remedial services and

rehabilitative programs; preventive measures -

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(f) Parental rights termination orders; evidence; determination of damage to child -

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1915 -Placement of Indian children

(a) Adoptive placements: preferences-

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member

of the child's extended family ; (2) other members of the Indian child's tribe; (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences -

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with --

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(d) Social and cultural standards; applicable -

The standards to be applied in meeting

the preference requirement of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

28 U.S.C. § 1257 - State courts; appeal; certiorari - -

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

No. 90-1493

FILED
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In The

Supreme Court of the United States

October Term, 1991

INDIAN CHILD WELFARE COORDINATOR
OF THE JUVENILE COURT OF THE
CHEYENNE RIVER SIOUX TRIBE, ET AL.

v. *Petitioners,*

CHESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES, ET AL.

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court of South Carolina

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The petition for a writ of certiorari to the Supreme Court of South Carolina was timely filed on March 11, 1991, and the guardian ad litem's brief in opposition to the petition was received April 15, 1991. Ordinarily, it would not be necessary to file a reply brief, but the guardian raises several procedural and substantive points that call for rebuttal.[1]

1. Petitioner Has Satisfied the Requirements of Rule 10

The guardian ad litem argues that petitioners have not met the requirements of United States Supreme Court Rule 10, which provides, in pertinent part, that a writ of certiorari may be granted when "a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court."[2] The guardian is

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[1] The guardian has submitted an affidavit which purports to record the testimony of two of the Indian children. Respondent's Brief, App. 1-2. This affidavit is both hearsay and outside the record and is entitled to no consideration. The affidavit does, however, reflect the close alliance of interests between the guardian and the non-Indian foster parents. Petitioner's Brief at 4-5 n.2.

[2] Respondent also argues that the Petitioner has not complied with Supreme Court Rule 14(h). The Petitioner has, however, complied with the rule. The Petitioner's Statement of the Case notes that the Tribe has sought transfer of this case to tribal court since June, 1984, and the essential controversy is the "persistent refusal of the South Carolina appellate courts to recognize the congressional mandate of the Indian Child Welfare Act of 1978" and transfer the case to tribal court. Petitioner's Brief at 2-3.

clearly mistaken. In this case, the Supreme Court of South Carolina disregarded this Court's decision in *Mississippi Band of Choctaws v. Holyfield*, 490 U.S. 30 (1989), without so much as a reference.

a. The State Supreme Court's Decision is Directly Contrary to the Congressional Mandate of the ICWA and the Teaching of *Holyfield*

Title 25 U.S.C. § 1911(b) *mandates* transfer of jurisdiction from state court to tribal court, absent "good cause" to the contrary, to prevent "the wholesale separation of Indian children from their families" and communities by state courts and state agencies. House Report No. 95-1386, p. 9 (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News, pp. 7530, 7544 (hereinafter "House Report"); *Holyfield*, *supra* at 45 n.18. In essence, the Respondent argues that, because the term "good cause" is not expressly defined by the ICWA, state courts are free to define that term "flexibly" without reference to the overriding purposes of the Act.[3] That is flatly wrong.

The views of the House Committee on Interior and Insular Affairs, and Chairman Udall, the principal sponsor of the bill, are the most authoritative guides to the

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[3] The guardian ad litem also argues that the rights of the children as Indians, their Indian mother and the tribe under 25 U.S.C. §§ 1912 and 15, need not be considered until the parental termination proceeding, Respondent's Brief at 18, yet this argument runs directly against the language of the House Report, p. 21. Moreover, the guardian ignores the fact that if the tribe were given an opportunity to try to rehabilitate the parents and reunite the family, there might be no need for the termination hearing. *See* Petitioner's Brief at 21.

construction of the statute. *Rice v. Rehner*, 463 U.S. 713, 728 (1983); *Kennerly v. District Court*, 400 U.S. 423, 429 n.5 (1971). The House Report's section-by-section analysis explains that 25 U.S.C. § 1911(b) *must* be applied to fully protect the federal rights which Congress created to protect Indian families and tribes:

> This section is intended to permit a State court to apply a modified doctrine of forum non conveniens, in appropriate cases, *to insure that the rights of the child as an Indian, the Indian parents or custodians, and the tribe are fully protected.*

House Report, p. 21 (emphasis added). In carrying out the congressional mandate to fully protect the rights of the children as Indians, the Indian parent and the tribe, under 25 U.S.C. § 1911(b), state courts must consider which forum is better able to protect those rights by: a) making active efforts to rehabilitate the parents and reunite the family, 25 U.S.C. § 1912(d)[4]; b) providing for Indian foster or adoptive placement, *see* 25 U.S.C. § 1915;

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[4] The guardian ad litem admits that after the family court made findings of sexual abuse at a preliminary hearing on foster placement in February, 1986, state social services stopped all efforts to rehabilitate the parents and reunite the family. Respondent's Brief at 16. And, the state supreme court failed to even consider that, based on the mother's residence on the Reservation in South Dakota, only the tribal court could hope to successfully rehabilitate her. Petitioner's Brief at 20 (Tribe's expert has a 90% success rate in treating abusive parents).

and c) conducting Indian child custody proceedings in accordance with tribal social and cultural standards.[5]

Nevertheless, the Supreme Court of South Carolina ignored the presumption in favor of tribal court jurisdiction and the congressional mandate to fully protect the rights of the children as Indians, the rights of their Indian mother and their tribe. Instead, upon a cold record, the state court reversed the family court and entered its own findings *de novo*: 1) *"The foster parents . . . would like to adopt"* the Indian children; 2) To overcome the Indian placement preference of 25 U.S.C. § 1915(a), "the *foster parents* will inevitably utilize the testimony of neighbors, friends, family, social workers, and psychologists to show their *fitness as parents*, to show how well the children have adjusted to their *foster homes*, and to show the impact on the children of removing them from their *foster homes*; and 3) "Since the Tribe does not have to overcome the

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[5] Another recent state supreme court decision similarly ignores Congress's direction to "fully protect" the rights of the Indian child, Indian parent and Indian tribe. *In Matter of T.S.*, 801 P.2d 77 (Mont. 1990), the Supreme Court of Montana ignored the Indian child's connection to the native community and the tribe's connection to the child in favor of "a best interests of the child" test which gave preference to the maintenance of an existing foster placement.

According to the family court, the child was, by the time of the trial court's decision, "adapted to her home now, and the foster family desires to adopt her as soon as possible." *King Island Native Community v. Montana*, Petition for Certiorari filed February, 1991, at 6. *In Matter of T.S., supra*, provides another example of a state court making the interests of temporary foster parents paramount to the interests of the natural Indian parent, the child and the tribe.

preference, it seems likely that fewer witnesses from South Dakota will be involved." Petitioner's App. at 6-7 (emphasis added). This rationale would lead to the same conclusion in *every* case involving non-Indian foster parents: denial of tribal court jurisdiction.

b. The State Supreme Court Reversed the Policy of the ICWA

In light of the congressional purpose animating the ICWA, the state supreme court's extreme solicitude for the interests of the non-Indian foster parents and concomitant derogation of the rights of the children as Indians, their Indian mother and the tribe are egregious violations of ICWA and this Court's decision in *Holyfield*. The *Holyfield* Court explained:

> The ICWA "[s]eeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," and by making sure that Indian child welfare determinations are not based on a "white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."

490 U.S. at 36 (citations omitted). The "receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed." *Holyfield, supra* at 45 n.18, quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986).

Yet, despite this clear statement, the state supreme court changed the rights of the children as Indians and

the rights of their tribe – which Congress had granted expressly to preserve their cultural and communal ties – into an almost insurmountable barrier to presumptive tribal court jurisdiction. Unquestionably, the result was that non-Indian foster placements were preserved at the expense of these Indian children's ties to their family, their community and their tribe. If allowed to stand, the state court's decision will render the heart of the ICWA, 25 U.S.C. § 1911(b), a dead letter.

CONCLUSION

The Court should grant the petition for certiorari because the state supreme court's decision directly conflicts with this Court's decision in *Holyfield, supra,* and casts a pall over the most fundamental Indian interests – "the future and integrity of Indian tribes and Indian families." *Holyfield, supra* at 45 n.18, quoting Chairman Udall.

For these reasons, the Petitioner respectfully requests this Court to grant the writ of certiorari.

Dated: April 22, 1991

Respectfully submitted,

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